Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

ADREAN LANS,
Petitioner

v.

MELISSA STUCKEY, DONALD LAGO, ARIEL SAUD, SALVADOR LOZANO, JORGE HUGO GOMEZ AND THE CITY OF MIAMI, A FLORIDA CORPORATION,
Respondent

On Petitition for Writ of Certiorari
To The United States District Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Adrean Lans
In propria persona
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QUESTIONS PRESENTED

1. Whether the Seventh Amendment permits a waiver of the right to a jury trial that is not knowing and intelligent on the part of the Petitioner?

2. Whether a trial court is duty bound to investigate the facts supporting a motion for recusal when a Petitioner just learns of the facts that provide the basis?

3. Whether a trial court that denies a motion for continuance, abuses his discretion when health and safety of the Petitioner's witnesses are in jeopardy?

4. Whether probable cause for any charge is sufficient to defeat a claim of malicious prosecution based on the wrong charge?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the Eleventh Circuit is Adrean Lans, a citizen of the United States of America.

The Respondents here and in the United States Court of Appeals for the Eleventh Circuit are Ariel Saud; Salvador Lozano; Jorge Hugo Gomez; Donald Lago; Melissa Stuckey; and the City of Miami, a Florida municipal corporation.

Pursuant to Rule 29.6, Petitioner states that no parties are nongovernmental corporations.

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Mr. Adrean Lans respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-5a) is reported at 2006 WL 2986486. The opinion of the district court (App. 5a-6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory are set forth in the Appendix.

STATEMENT

The Petitioner Adrean Lans, a citizen of Florida, is the victim of a false arrest, malicious prosecution and deprivation of federal and state constitutional rights pursuant to 42 U.S.C. § 1983, which began on September 5, 2001 and which continued to this date, even after the criminal case was nol prossed due to the injurious harm and damages he continues to suffer.

Respondents Melissa Stuckey, Donald Lago, Ariel Saud, Salvador Lozano and Jorge Hugo Gomez were police officers employed with the City of Miami on September 5, 2001 and remain employed in that capacity to this day and are the principal actors that violated Petitioner's rights under the color of State Law, regulation, custom or usage.

Respondent City of Miami, a Florida municipal corporation, is an entity organized under the laws of the State of Florida, which

provided law enforcement services to the City of Miami, Florida, and is a person subject to suit pursuant to 42 U.S.C. § 1983 and is responsible to the Petitioner under the failure to screen, properly hire, supervise, train and regulate the conduct of the City's officers allowing a pattern and practice to develop that is harmful to Petitioner and the community.

Petitioner was previously a City of Miami police officer in 1989 and resigned due to his disagreement with many of the things he encountered on the force, particularly racism and animosity towards respondents of color. Petitioner still remained active in the community, particularly Overtown, and subsequently worked for Miami-Dade County as a social service aide. Petitioner organized community events, a softball league and was trying to fix up the Dorsey Library – in 2001 he had contact with the City of Miami Board of Commissioners. Petitioner came into contact with Melissa Stuckey on September 5, 2001. Petitioner has known Officer Stuckey and her mother prior to this date and time. Petitioner also knew Sergeant (now Commander) Gomez through his work in Overtown as both a social aide and a community activist. The incident took place within the jurisdiction of unincorporated Miami-Dade County, not the City of Miami.

Petitioner offered Officer Stuckey a ride, not knowing what her current status as an officer was, or why she would be sitting in plain clothes at a bus stop. After Officer Stuckey refused the ride, Petitioner went to leave and did not observe Officer Stuckey making any strange gestures. Officer Stuckey then attempted to hold onto Petitioner's vehicle. Other police cars emerged and proceeded to detain the Petitioner at 3701 NW 32nd Avenue. Officer Donald Lago, grabbed Petitioner and forcefully pushed him up against a vehicle, causing him injuries. Petitioner asked for a sergeant to come to the scene as Petitioner felt the officers made a tremendous mistake and that request was denied. Officer Lago went through Petitioner's wallet and noticed that Petitioner was previously a police officer. Officer Lago also took two cell phones from the Petitioner. Officer Stuckey instructed for the other officers to let Petitioner go. Petitioner was allowed to leave, proceeded to drive off and then had to return because Officer Lago still had his cell phones. When

Petitioner asked Officer Lago for the cell phones, Lago told Petitioner, "The sergeant wants to see who you are." Officer Lago transported Petitioner back to the station. Officer Saud jumped into Petitioner's vehicle and drove it back to the station.

Petitioner was taken to the station and did not see Officer Stuckey after his initial encounter. Petitioner came into contact with Officer Salvador Lozano and Sergeant Gomez. Sergeant Gomez filled out the paperwork and Petitioner did not see him use a radio or speaking with Officer Stuckey. Petitioner observed Sergeant Gomez notarize the A form himself. Petitioner also saw, Sergeant Gomez receive money that may have been kickbacks from a tow truck driver that impounded Petitioner's vehicle for the City of Miami. Petitioner was given a Promise to Appear and was released based on the officers familiarity with him.

Petitioner attended all scheduled proceedings during the criminal prosecution. The City of Miami Vehicle Impoundment program held an administrative hearing, which the officers failed to attend. There was a determination of no probable cause to impound the vehicle due to the officers' failure to appear. The criminal County Court case was scheduled three times for trial, and at the third trial setting, the case was nol prossed by the Miami-Dade County State Attorney's Office in November of 2001. As Petitioner exited the courthouse, Petitioner saw Officer Stuckey, lingering about, on his way out, making no attempt to head towards the courtroom. The case was never refiled.

Petitioner has never been known by the name Curtis Knight. Petitioner only raises this fact, because in the documents the officers and the City of Miami submitted in support of their motions for summary judgment, mysterious documents using this name and indicating this case M0032544, which was a charge of solicitation of prostitution was charged and that Respondent admitted to the Pre Trial Diversion (PTD) program. Petitioner objected to the introduction of these documents in his response to the motion for summary judgment – the Respondents nor their counsel have never explained why those documents were included and the District Court has never ruled on the objection nor stricken them from the record nor ever commented on them.

On August 27, 2004, the Complaint Petitioner had filed against these Respondents was removed from State Court (11th Judicial Circuit Court, Miami, Florida), to the District Court (United States District Court, Southern District of Florida). The claims primarily stemmed from the arrest of the Petitioner taking place on September 5, 2001. The prosecution terminated in November of 2001, when the state announced a nolle prosequi in the case. On October 8, 2004, Petitioner forwarded to the Respondent Jorge Hugo Gomez, a First Request for Production. Petitioner also forwarded to the Respondent Melissa Stuckey, a First Request for Production on that same date. Petitioner then filed a motion to compel requests for production as to those officers on November 22, 2004. The respondents failed to respond to the motion, and based on that failure, default was granted pursuant to Local Rule 7.1.C, and the district court ordered that Respondents comply within 10 days.

Despite the order, Respondent Gomez maintained he had no more information to allow the inspection and copying of, relative to documents that Petitioner requested. Respondent Stuckey maintained the same, herself not providing a meaningful discovery response. Stuckey's Response to Request for Production. Respondents even tried to have the order vacated via motion on January 3, 2005. The district court, in language suggesting that sanctions would be appropriate the next time respondents wasted the district court's time on the issue, denied the motion to vacate. The Magistrate judge was reassigned from Stephen T. Brown to Theodore Klein.

Petitioner still encountered numerous difficulties as respondents apparently were ignoring Magistrate Judge Brown's order and therefore again attempted to request the documents, this time, via subpoena duces tecum to Respondents Gomez and Stuckey via notice of deposition given March 13, 2005 for depositions scheduled March 30, 2005. Respondents arrived at the deposition without the items and did not provide them within 30 days of the subpoena duces tecum and petitioner was forced to file another motion to compel these items, to show the district court, that respondents were still being nonresponsive.

Magistrate Judge Klein denied the motions. The district court asserted that the motions should have been filed within 30 days of the occurrence of the grounds. The district court additionally indicated that as Rule 34 requests (which is what subpoenas duces tecum filed by a pro se litigant amounted to), the Respondents had 30 days to respond. Yet the district court did not correctly calculate the time: a month from the request was April 13, 2005 and a month from that was May 13, 2005. Therefore, the motion to compel substantially complied with the time requirements, whether or not they had to bring the requested production to the deposition was irrelevant to the final determination.

Moreover, Magistrate Judge Klein simply took defense counsel's representations as credible over Petitioner's yet completely disregarded prior history, when Magistrate Judge Brown ruled against the respondents previously; there were alarming concerns because of blatant misrepresentations by defense counsel in their motion to vacate, hence why the suggestion of the possibility of sanction in the future when this might become an issue again. In other words, Magistrate Judge Klein merely accepted a story that Petitioner never tried to work out discovery problems with respondents in good faith, didn't even consider an evidentiary hearing, and ruled based purely on defense counsel's stating that Had that been the case, there would have been no need to keep requesting these items in the first place – Petitioner had complied with Local Rule 7.1.A.3 and filed the motion in good faith after conferring with defense counsel has been doing with every motion in this case.

Respondents moved for summary judgment on June 13, 2005. Petitioner replied on July 13, 2005.

In this case, no previous continuances were requested by the Petitioner but the district court had itself taken a court continuance in the matter once from an original trial date of 9/19/2005, due to the length of time he took to rule on the summary judgment, the month before. Minutes of Calendar Call held on 9/13/2005.

The district court found for summary judgment in favor of all of the Respondents except Officer Melissa Stuckey and Donald Lago on October 17, 2005, which is reflected in two separate orders. This included granting summary judgment for the City of Miami as with

respect to claims for failure to train, failure to supervise, negligent hiring and so forth.

Moreover, there was a two-week trial period for which this matter was scheduled, starting October 31, 2005, and calendar call was set for October 25, 2005. This fell right during Hurricane Wilma, which hit Miami-Dade County on October 24, 2005 and the federal courthouse was closed from that time until it re-opened on a limited basis on November 1, 2005. *See* Southern District of Florida, *In Re: The Matter of Summoning Jury Panels For Trials In Miami, Florida* (available at http://www.flsd.uscourts.gov/default.asp?file=adminorders.asp) (Administrative Order 2005-48, November 4, 2005). As history reveals:

> Hurricane Wilma was the twenty-first named storm, thirteenth hurricane, and sixth major hurricane, and third Category 5 of the record-breaking 2005 Atlantic hurricane season. Wilma set numerous records for both strength and seasonal activity. At its peak, it was the most intense tropical cyclone ever recorded in the Atlantic basin. It was the only time three Category 5 hurricanes formed in the Atlantic in one year, and Wilma was only the third Category 5 to develop in the month of October. Wilma was the second 21st storm in any season, and the earliest-forming 21st storm by nearly a month. Wikipedia, *Hurricane Wilma*, (available at http://en.wikipedia.org/wiki/Hurricane_Wilma) (last modified February 4, 2006).

Petitioner was distressed due to extreme hardship, but was told on Wednesday, November 2, 2005, to appear for trial on November 4, 2005, at 11:30am, that the Judge was ordering Petitioner to appear. The trial was actually set for 11:00am unbeknownst to the Petitioner and thus the district court came down on the Petitioner for being late on the day of trial he stated, "Mr. Lans you were late."

Petitioner explained to the Judge's law clerk Alex Gomez, that his house phone was not working consistently (some calls did not always come through or were not heard clearly) and Petitioner

still did not have power, in order to impress upon him that Petitioner and his family were having serious problems being without electricity, gas, food and water. Petitioner did originally contact the District Court first about trial, to make sure that in fact, nothing was scheduled that Petitioner was not aware of because of the original notice. The District Court casually acknowledged that things were "sort of up in the air" all week.

In furtherance of the abuse, the District Court was prepared to grant a continuance to the defense if the Petitioner had gotten past the liability phase of the trial:

> **THE COURT:** I'll tell you what, if you prevail on the liability phase of the case, I'll give you a chance to bring that doctor in, but you'll have to give copies of everything to Miss Bru and let her take his deposition....

Trial Transcript, Pg 29, Lines 4-7. This is strange because, there has never been a problem with Petitioner turning over discovery and there were no pending motions to compel or anything from the defense indicating that Petitioner was withholding information – in fact, in Petitioner's deposition taken on February 16, 2005, when defense counsel asked Petitioner for the name of his primary doctor, Petitioner answered, "My primary doctor, I believe is Dr. Ross, David Ross." Deposition of Adrean Lans, Pg 29, Lines 17-18. Defense counsel did freely question Petitioner about his injuries and treatment with Dr. Ross in that deposition. *Id.*

Petitioner turned over the name of this witness in his disclosures of witnesses he planned to call, response to Respondent's interrogatories and response to discovery requested by the defense. The district court berated a mistaken pro se Petitioner for not having deposition transcripts eight months after depositions were taken yet was prepared to allow defense counsel, an experienced attorney, a continuance to take a deposition and conduct further discovery after the discovery deadline had passed with no reason whatsoever offered as to why the respondents never bothered to take the deposition within the nine months between Petitioner's deposition and the trial date.

Petitioner had turned over the motion for continuance as soon as he entered the courtroom, and continued to insist upon it when he said:

> **MR. LANS:** Yes, sir.
> Your Honor, as I said, my witness is a doctor, Dr. Ross is not available today, because I have short notice. I guess he don't have lights up in their homes, I'm unable to subpoena some of the guys.

Trial Transcript, Pg 11, Lines 24-25, Pg 12, Lines 1-2. Petitioner tried to express to the trial court, that his witnesses would not be able to come to court due to tremendous disadvantage Hurricane Wilma and its aftermath, placed everyone in and that their absence would materially prejudice Petitioner. *Id.* Additionally, Petitioner did exercise due diligence and in fact call these individuals and was unable to reach many of them due to the lack of electricity and downed telephone lines. However, before Petitioner could further elaborate the district court cut the Petitioner off and did not permit the Petitioner to explain that he wanted the continuance, before any testimony began. Trial Transcript, Pg 12, Lines 4-7.

Subsequently, when the continuance was brought up again, during the direct examination of Melissa Stuckey, the district court complained at that point, that the motion for continuance was not raised until after trial actually started. Trial Transcript, Pg 30, Lines 2-5. However, the district court was prepared to grant the defense a continuance to depose Dr. Ross after the trial had started, which constituted an abuse of discretion since the trial court was opening up opportunities to the defense and not the Petitioner without any apparent justification. Trial Transcript, Pg 29, Lines 4-7.

In the Miami-Dade County Criminal Justice Information System database, which houses information accessible to the public about the past "priors" of those that have been charged with crimes, there will forever be an entry that Petitioner was arrested for the offense of "Prostitution" under the Statute or Ordinance "16-16" – which reflects the crime Petitioner was actually arrested for Offering to Commit Prostitution rather than Solicitation of Prostitution and

that since his prosecution was initiated directly by the City of Miami Police Department and not the State of Florida, that the "16-16" rather than "796.07(2)(e)" is an administrative way the state 11th Circuit Clerk of Court reflects use of municipal charging powers. Additionally, the County Court documents do not reflect a bench warrant ever being issued to Petitioner -- the County Court's remedy should the Petitioner not have appeared for any of the scheduled proceedings. The District Court gave little weight to the existence of the nolle prosequi itself, simply reflecting that non-attendance of the officers at the probable cause administrative hearing for the impoundment of the vehicle and at the County Court trial (the case went to trial three times before the case ended with a nolle prosequi), meant that the District Court believed that Officer Stuckey was never properly subpoenaed by the State Attorney's Office (with regards to the County Court case) or even the City of Miami (with regards to their own internal administrative hearing) numerous times. Affidavit of Melissa Stuckey, Pg 2 ("I went to court one time in connection with the criminal prosecution but at that court date Adrean Lans did not appear. I never received any other notification of court date and did not know the outcome of the criminal proceedings.") Petitioner on the other hand, contended that he attended all trial proceedings but there existed independent evidence – no bench warrant ever issued for the Petitioner which is the procedure to be followed whenever a criminal accused misses a trial date absent excuse by the district court, which is not documented or reflected in the docket either. The district court at many points, forced Petitioner to forego asking certain questions on grounds that the district court frowned on "tidbits about people's personal lives." Trial Transcript, Pg 134, Lines 1-6.

The A form reads in the probable cause narrative: "... I walked to the corner and contacted Def. Who after a brief conversation offered me twenty dollars for a blow job." R-Vol. 75.

The District Court's faith in Officer Lago's answers were clearly incredible as well when he supplied these answers during the direct examination of the Petitioner, when Officer Lago was called during Petitioner's case:

Q. You read me my Miranda rights?
A. I can't. I didn't witness that. I'm not making the arrest. I'm just –
Q. You just told me you made the arrest, and you just –
A. No. I detained you to transport you to the office.
Q. But… you just told me you made the arrest; now you telling me you didn't make the arrest.
A. Well I apologize on that…

Trial Transcript, Pg 72, Lines 5-12. The District Court, anticipating the flaws in this testimony, then proceeded to *instruct* the respondent what his testimony should be:

THE COURT: Officer, you arrested him, right?
THE WITNESS: No, sir. All I did was the takedown, your Honor.
THE COURT: What do you think that is?
THE WITNESS: Well, I mean I was part – I participated in the arrest, but I didn't make the actual arrest myself. I did participate because I did detain him. That's why I answered yes.
THE COURT: But Officer Stuckey wasn't involved in the arrest, because she was doing what she was doing with the undercover sting.
THE WITNESS: Yes, sir. She –
THE COURT: Who put him in custody?
THE WITNESS: I did, sir. I did.
THE COURT: Then I think that's an arrest.

Trial Transcript, Pg 72-73, Lines 16-25, 1-5. Now the falsehood of Officer Lago's testimony exposes itself on the cross examination of Officer Lago, during the Respondent's case in chief:

Q. So, you arrested me, right?
A. Yes, sir.
Q. Did you told me that I was under arrest?
A. Yes, I did.

Q. Where in the report or what evidence you have that you told me I was under arrest?
A. Just my honor, that's all I have.

Trial Transcript, Pg 144, Lines 19-25. So here, is Officer Lago, who clearly testified initially that he did not arrest Petitioner – therefore, how could he be telling Petitioner he is arresting him? Trial Transcript, Pg 72, Lines 9.

After the Judge led Officer Lago to the conclusion he arrested the Petitioner, not only in his later testimony does Officer Lago maintain he arrested the Petitioner, but he indicates he told Petitioner he was under arrest so much as maintaining it was based on his honor. Trial Transcript, Pg 144, Lines 21-25.

Yet the District Court found Officer Lago fully credible and uses the story Officer Lago had given about Petitioner involving some strange request for "courtesy" to explain why Petitioner was not handcuffed. Trial Transcript, Pg 159, Lines 17-22.

The district court went had stated:

> **THE COURT:** Whether or not you know police officers or don't know them or are familiar with them or not makes no difference to me. It's not going to help your case; it's not gonna hurt your case.

Trial Transcript, Pg 133, Lines 18-21. Yet this seems to fly in the face of the district court's later statements:

> It seems to me that Mr. Lans' testimony with regard to what he did on that night is not persuasive. Not only do I credit the testimony of Officer Stuckey and Officer Lago over the testimony of Mr. Lans, it seems to me that it would be very difficult to find how Mr. Lans would know Officer Stuckey and Officer Lago, given that those two officers joined the City of Miami Police Department after Mr. Lans was dismissed from that department.

Trial Transcript, Pg 160, Lines 2-9. Therefore, the district court would not allow Petitioner to direct leading questions to show that he knew personal things about the lives of many officers when in fact and could elicit testimony to make inferences of connections between these officers and himself - such evidence would have been entirely probative to bring out the fact that he knew the officers; therefore, the district court must have already determined the facts of the case in his own mind, before the trial began and not really wanted to let the Petitioner try to prove his case:

> **THE COURT:** I know what your version of events is, and I know what you think the officers are not telling the truth. But you can't just sit there and say things like you're not telling the truth, you're not being truthful, the truth is going to hurt you, it's going to come out. You can't do things like that.

Trial Transcript, Pg 45, Lines 14-16.

The district court showed a clear bias when it stated, "... it seems clear to me that it would be very difficult to find how Mr. Lans would know Officer Stuckey and Officer Lago, given that those two officers joined the City of Miami Police Department after Mr. Lans was dismissed from that department." Trial Transcript, Pg 160, Lines 5-9. At no time, was there ever any document presented in this case or testimony that Petitioner was fired, discharged, or dismissed from the City of Miami Police Department. Trial Transcript, Pg 176, Lines 11-13 (in Petitioner's affidavit used in connection to defend against the motion for summary judgment by the respondents, Petitioner specifically explained the circumstances of his resignation, which the district court seemed to blatantly disregard later on). Yet in contrast, the district court went out of its way to ignore the "F" grades achieved by Commander Gomez and the deceit about his educational background as well as reprimands in the files of the other officers.

In fact, to the contrary, the only evidence offered was that Petitioner resigned the department, yet the District Court presumed the opposite to Petitioner's detriment (an error of assuming facts not

in evidence), evidencing the bias -- which he stated on the record as part of his credibility determinations. *Id.* Petitioner in his supplemental affidavit which had been presented in opposition to respondents' summary judgment motions, indicated that he was coerced into charging people for crimes without probable cause and that there was a racial agenda, which he strongly disagreed with.

The District Court totally disregarded the entirety of this information when ruling against the Petitioner in making his credibility determinations that the Petitioner was not credible but that Officers Stuckey and Lago were fully credible. *Id.*

The District Court found for the respondents and ruled that the Petitioner take nothing away from the case. The District Court reiterated that he was denying the motion for continuance and denied the motion for new trial as well as recusal. Petitioner brought an appeal to the Eleventh Circuit and the decision of the trial court was affirmed. Petitioner filed a motion for reconsideration and en banc hearing, and the motion was denied. Petitioner filed a motion to recall the mandate and for further reconsideration and that motion was not only denied, but the Court of Appeals directed the file to be closed and that no further pleadings be accepted from the Petitioner. Petitioner now brings this writ.

I. THE LOWER COURT'S FINDING OF A WAIVER OF THE JURY TRIAL DEMAND VIOLATED THE SEVENTH AMENDMENT OF THE UNITED STATES

"Nullus liber homo capiatur, vel imprisonetur, aut desseisetur de libero tenemento, vel libertatibus, vel liberis consuetudinibus suis, sut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae." Magna Carta, Chapter 39 ("No free man shall be captured, and or imprisoned, or disseised of his freehold, and or of his liberties, or of his free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, and or by the law of the land"). Not surprisingly the Star Chamber being notorious for placing too much

power in the hands of the monarchy in deciding legal issues, came to be abolished in 1641, by the following resolution: "WHEREAS by the great charter many times confirmed in parliament, it is enacted, That no freeman shall be taken or imprisoned, or disseised of his freehold or liberties, or free customs, or be outlawed or exiled or otherwise destroyed, and that the King will not pass upon him, or condemn him; but by lawful judgment of his peers, or by the law of the land..." Abolition of the Star Chamber, "An act for the regulating of the privy council, and for taking away the court commonly called the star-chamber," July 5, 1641.

At the Constitutional Convention, the motion for a clause requiring a right to jury in civil trials in Article III, § 2 was defeated, but the issued was proposed by Madison to the House in the face of pressure supplied by those opposed to ratifying the Constitution and thus found its way into the Bill of Rights as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Seventh Amendment to the Constitution of the United States. "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." J. Story, Commentaries on the Constitution of the United States 1757, 1762 (1833).

A litigant seeking legal relief is entitled to a jury trial in a civil case where the action is comparable to what would have been a "suit at common law" at the time the Bill of Rights was ratified. *See Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990). "[S]uits at common law" include "not merely suits, which the common law recognized among its old and settled proceedings, but [also] suits in which legal rights were to be ascertained and determined, in contradistinction to those where

equitable rights alone were recognized, and equitable remedies were administered." *Parsons v. Bedford*, 7 L.Ed. 732 (1830). Although "the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791," the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. *Curtis v. Loether*, 415 U.S. 189 (1974).

Therefore the Seventh Amendment provides the bringers of a 42 U.S.C. § 1983 claim with a right to a jury trial, because such a claim "soun[ds] basically in tort." *Curtis*, 415 U.S. at 195-196. 42 U.S.C. § 1983 establishes a unique cause of action which is an action at law, in that, the legal duty, which is the basis for relief is ultimately defined by an extrinsic body of law to "federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144, n. 3 (1979). In actions at law predominantly factual issues, particularly issues of liability are in most cases allocated to the jury. *See Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

Rule 38 of the Federal Rules of Civil Procedure, entitled "Jury Trial of Right," in pertinent part, provides:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.
>
> ...

> (d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

In *Chapman v. Kleindienst*, the Seventh Circuit held that the trial court erred in not holding a jury trial when a pro se litigant only made reference to his jury demand in paragraph 34(b)(7) of his complaint, which was a poor practice but that "the court and its staff have a special responsibility to scrutinize carefully pro se complaints for just such infirmities." 507 F.2d 1246, 1253 (7th Cir.1974);[1] *See also Partee v. Buch*, 28 F.3d 636 (7th Cir.1994). Additionally, a petitioner is entitled to rely on a respondent's jury demand to preserve his own right to a jury trial, and because the right to a jury trial is "fundamental," "waiver is not lightly to be inferred." *Gargiulo v. Delsole*, 769 F.2d 77, 79 (2d Cir.1985).

The second sentence of Rule 38(d) has been interpreted as incorporating a right of reasonable reliance on the jury demand of another party. *In re N-500L Cases*, 691 F.2d 15 (1st Cir.1982). Where one party has made a demand, others are entitled to rely on the demand with respect to issues covered by the demand and need not make an independent demand of their own. *Rosen v. Dick*, 639 F.2d 82, 91-92 (2d Cir. 1980); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 690 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Collins v. Government of Virgin Islands*, 366 F.2d 279, 284 (3d Cir. 1966), *cert. denied*, 386 U.S. 958 (1967).

The right to jury trial is too important and the usual procedure for its waiver is too clearly set out by the Civil Rules for courts to find a knowing and voluntary relinquishment of the right in

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[1] Even where a litigant expressed the right by checking off a box on a civil cover sheet but failed to serve that on the other party, the magistrate was found in that case to have an affirmative duty to ensure the proper service and that the litigant did not waive a timely filing of a demand for jury trial, even after consent of the parties to a bench trial before the magistrate and petitioner's participation in a bench trial. *Wright v. Lewis*, 76 F.3d 57 (2d Cir.1996).

a doubtful situation. *Bowles v. Bennett*, 629 F.2d 1092, 1095 (5th Cir.1980), *citing and quoting Heyman v. Kline*, 456 F.2d 123 (2d Cir.1972), *cert. denied*, 409 U.S. 847.[2] "[T]he right of jury trial is fundamental, [and] courts [must] indulge every reasonable presumption against waiver." *Id.* (emphasis added), *quoting Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Local 783, Allied Industrial Workers v. General Electric Co.*, 471 F.2d 751, 756 (6th Cir.), *cert. denied*, 414 U.S. 822 (1973).

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In a case, where a 42 U.S.C. § 1983 pro se petitioner had properly demanded a jury trial in compliance with Rule 38, but the petitioner subsequently signed a subsequent a waiver of the right to jury trial form, trial court conducted a bench trial and petitioner did not object and participated in the bench trial, the waiver was not found to be voluntary and knowing regardless of the written form and the colloquy. *Jennings v. McCormick* 154 F.3d 542 (5th Cir.1998). This was in line with the requirement that the "courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389 (1937); *See Hodges v. Easton*, 106 U.S. 408, 412 (1882); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 385 (1913); *Patton v. United States*, 281 U.S. 276, 312 (1930); *Dimick*, 293 U.S. at 486; *Foust v. Munson S. S. Line*, 299 U.S. 77 (1936).

Where a demand for a jury trial has been properly made under Fed.R.Civ.P. 38(b), the failure to fulfill an additional requirement of a local rule to place a notation to that effect in the title cannot constitute a waiver of a trial by jury. *Pradier v. Elespuru*, 641 F.2d 808 (9th Cir.1981). Even where the strict procedures of Rule 38 and 39 have not been fully complied with,

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[2] The Second Circuit has held that Rule 39(a) "assures that the precious right to a jury trial will not be frittered away by casual findings of waiver." *Tray-Wrap, Inc. v. Six L's Packing Co.*, 984 F.2d 65, 67 (2d Cir.1993). Waivers of a jury trial are to be "scrutinized with the utmost care." *Tray-Wrap*, 984 F.2d at 67. Conduct constituting waiver "must be clear and unequivocal." *Tray-Wrap*, 984 F.2d at 68.

even detrimental reliance to the extent that a bench trial has already taken place, cannot serve to quash the important Seventh Amendment right to a jury trial where one has been properly demanded. *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522 (9th Cir.1995); *See Merritt v. Faulkner*, 697 F.2d 761, 767 (7th Cir.1983) (noting that the mere fact that petitioner moved for jury trial too late is not a strong or compelling reason to deny jury trial), *cert. denied*, 464 U.S. 986 (1983); *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir.1965) (holding that a court should grant a jury trial in the absence of strong and compelling reasons to the contrary); *Swofford v. B & W, Inc.*, 336 F.2d 406, 409 (5th Cir.1964) (holding that when a court's discretion is invoked under Rule 39, the court should grant a jury trial in the absence of strong and compelling reasons to the contrary), *cert. denied*, 379 U.S. 962 (1965).

In this instance, clearly, the petitioner properly demanded a jury trial but then the trial court proceeded on petitioner's actions as if they constituted a legitimate waiver and made no inquiry as to whether that waiver was knowing and intelligent. Under such circumstances, the conducting of a bench trial unconstitutionally deprived petitioner of his due process rights.

II. TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT THE IMPROPRIETY OF LAW CLERK'S ACTIONS CALLED IMPARTIALITY OF COURT INTO QUESTION UNDER 28 U.S.C. § 455(A)

Whenever a judge's impartiality "might reasonably be questioned" in a judicial proceeding, 28 U.S.C. § 455(a) requires that the judge disqualify himself. An objective, disinterested person reviewing these facts can tell, that the district court, who thought the Petitioner was a fired cop, had in his mind, already determined what kind of person he thought Petitioner was and what kinds of people he thought the Respondents were. *See Offutt v. United States*, 348 U.S. 11, 14 (1954) (purpose of 28 U.S.C. § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible).

Courts have interpreted this statute to require recusal if a reasonable person, knowing all of the facts, would harbor doubts concerning the judge's impartiality. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988). Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system. *In re Kensington Intern. Ltd.*, 368 F.3d 289 (3rd Cir. 2004). In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the Court stated: "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

In the instant case, Petitioner alleged that a law clerk misled him about matters, which the clerk should have had no discussion with Petitioner about. *See Parker v. Connors Steel Co.*, 855 F. 2d 1510, 1524 (11th Cir. 1982) (recusal found appropriate where public would have doubt because judge gave an undue amount of credit to a law clerk); *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F. 2d 593, 596 (5th Cir. 1977) (it is the duty of the law clerk as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation); *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F. 2d 444, 447 (6th Cir. 1980), *cert. denied*, --- U.S. ----, 102 S.Ct. 674 (1981) (clerk is forbidden to do anything that is prohibited for the judge to do).

The trial court dismissed such allegations simply claiming that Petitioner had 8 months to get the transcripts but never attempted to conduct even a small inquiry as to whether the incident between Petitioner and the law clerk happened at all – these allegations which were made under oath, with the District Court simply ruling "[m]y law clerk did not mislead Mr. Lans...." Order on Post-Trial Motions, Pg 1-3.

Numerous circuits have held steadfast to the timeliness requirement as precluding most recusal motions. *In Re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980); *United States v. Daley*, 564 F.2d 645, 651 (2d Cir. 1980), *cert. denied*, 435 U.S. 933 (1978); *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). *Accord, City of Cleveland v. Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368 (N.D.Ohio 1980);

Cf. Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567, 574-75 (4th Cir. 1975); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Marcus v. Director, Office of Workers' Compensation Programs, U. S. Department of Labor*, 548 F.2d 1044, 1051 (D.C.Cir.1976) (stating general rule that one must raise the issue of disqualification of the trier, whether he be a judge, administrator, or an arbitrator, at the earliest practicable moment after relevant facts become known). The Seventh Circuit has stated its opposition to any timeliness requirement. *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). The Fifth Circuit has looked to see whether the timeliness requirement should apply based on a totality of the circumstances. *Potashnick v. Port City Const. Co.*, 609 F. 2d 1101, 1115 (5th Cir.1980).

In the instant case, the approach of the Seventh Circuit or Fifth Circuit makes more sense, since the misleading by the law clerk affected Petitioner's trial strategy in that Petitioner had to learn during the course of trial that he should have had the transcripts - Petitioner was not actually using the timing of the recusal as part of the trial strategy. *Id.* In other words, the timeliness requirement is used to deter those petitioners who take a "let's wait and see" approach, to leave themselves an escape route when the trial goes sour. *Id.*; *Hall v. Small Business Administration*, 695 F. 2d 175, 178-79 (5th Cir. 1983) (recusal not barred by timeliness requirement where it was not part of trial strategy).

Since in this case, a good portion of the reason for the timing was based on a fundamental problem that arose during the course of trial, it can hardly be said, that Petitioner planned to intentionally not bring transcripts to be used for impeachment and then fabricate a story about the law clerk, just so that he could turn around and ask for a recusal and new trial – such an argument gives a pro se Petitioner quite a bit of credit about knowing crafty tricks most lawyers would not even know of or engage in. Trial Transcript, Pg 165, Lines 16-25, Pg 166, Lines 1-5 (during trial, Petitioner explained to Judge his conversation with the law clerk in which the clerk told him again he did not need the transcripts).

It is clear from the record, that the actions of the District Court reflected a disregard of the appearance of a question of impropriety in the public eye, which was tantamount to a significant doubt from a reasonably objective detached observer that the judge could not be partial in this matter due to extra-judicial predilections and the biases which have been previously stated. *Offutt*, 348 U.S. at 14. The trial court made no inquiry of the law clerk in question, whatsoever to determine whether recusal was appropriate and the Eleventh Circuit simply dismissed petitioner's claims as untimely. If an ignorant pro se petitioner is misled by a law clerk that ultimately sabotages the outcome of the trial court's findings – but the realization of that comes too late, how can such a claim be ignored without any investigation whatsoever? The approach of the Fifth and Seventh Circuit in recognizing limitations of a strict timeliness requirement make more sense in lieu of these particular factual circumstances.

III. THE LOWER COURT'S DENIAL OF A MOTION FOR CONTINUANCE WAS AN ABUSE OF DISCRETION THAT VIOLATED DUE PROCESS RIGHTS

The facts of this case were that South Florida had just come off a devastating hurricane and considering that, Southern District Court Chief Judge Zloch found in his Administrative Order issued the same date as this trial proceeding that "[t]he Court takes judicial notice of extensive power interruptions across the Court's divisions affecting transportation and communication and compromising public safety, as well as substantial damage to personal property...." Southern District of Florida, In Re: The Matter of Summoning Jury Panels For Trials In Miami, Florida (available at http://www.flsd.uscourts.gov/default.asp?file=adminorders.asp) (Administrative Order 2005-48, November 4, 2005). The District Court rushed Petitioner into a trial riddled with severe handicap and misunderstanding and denied Petitioner's reasonable request for a continuance. The District Court erred in denying Petitioner's motion for continuance. *See Hicks v. Wainwright*, 633 F. 2d 1146 (5th Circ. 1981) (Court held it was not an abuse of discretion where trial court

found that a witness's testimony was critical and had granted a continuance); *Cf. Hudelson v. Cowdry*, 3 Fed.Appx. 845, 2001 WL 95140 (10th Cir. 2001) (where petitioner filed a motion for his third continuance and failed to make showing other than it was "the Christmas holidays", denial of continuance motion not an abuse of discretion where it was not a manifest injustice); *Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202 (7th Cir. 1985) (where respondent filed a motion for his third continuance, not an abuse of discretion to deny where court found respondents were "dragging their feet.") Of course by contrast to this case, not a single continuance had ever been granted.

Additionally, the trial court failed to use the following analysis, which Petitioner was prepared to argue: (1) that due diligence was exercised to obtain the attendance of the witness; (2) that the witness would tender substantial favorable evidence; (3) that a witness was available and willing to testify; and (4) that the denial of a continuance would materially prejudice the party. *United States v. Scott*, 48 F. 3d 1389, 1394 (5th Cir.), *cert. denied*, --- U.S. ----, 116 S.Ct. 264 (1995). Petitioner was prepared to satisfy all of those requirements and hence, the trial court's unreasonable failure to consider these factors and the serious prejudice to the Petitioner, was an abuse of discretion. The facts were at issue and no evidentiary hearing was held to determine the issue; therefore the trial court's denial of the continuance is a denial of due process rights. *Hicks*, 633 F. 2d at 1146 (granting of continuance to allow opportunity for critical testimony to come in, not found to be an abuse). At most, the district court rushed petitioner to proceed on the liability phase without petitioner's liability portion witnesses and dangled the red herring of granting a continuance as to the damages phase.

But more importantly a continuance is appropriate where health concerns are at stake. *Latham v. Crofters*, 492 F.2d 913 (4th Cir.1974) (where a respondent suffered unexpected illness, trial court did not abuse discretion in granting a motion for continuance); *see also Polo v. C.I.R.*, 1993 WL 379222 (Tax Court, September 28, 1993) (involves a passing discussion of where the tax court granted a continuance based on a hurricane's damaging the offices of the petitioner and affecting trial preparation). In the present case, the

power interruptions, lack of traffic signals in a majority of the county and lack of electricity which left many scrambling for food and water, clearly was a present health concern, so much so, that the Chief Judge of the District, suspended jury trials on the same day this bench trial proceeded.

IV. THE TRIAL COURT ERRED IN REJECTING THE PETITIONER'S MALICIOUS PROSECUTION CLAIM WHERE THE POLICE DIRECTLY INITIATED A BASELESS PROSECUTION UPON A CHARGE NOT SUPPORTED BY PROBABLE CAUSE

As with respect to a retaliatory prosecution claim under 42 U.S.C. § 1983, some Circuits burden petitioners with the obligation to show its absence of probable cause. *See, e.g., Wood v. Kesler*, 323 F.3d 872, 883 (11th Cir. 2003); *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002); *Mozzochi v. Borden*, 959 F.2d 1174, 1179-1180 (2nd Cir. 1992). Others, including the District of Columbia Circuit, impose no such requirement. *See, e.g., Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001); *Haynesworth v. Miller*, 820 F.2d 1245, 1256-1257 (D.C. Cir.1987). However, the no probable cause requirement has seemed axiomatic where malicious prosecution is concerned. *See Heck v. Humphrey*, 512 U.S. 477, 483-485, and 484, n. 4 (1994).

Any dispute as to the burden has subsequently been resolved by this Court. *Hartman v. Moore*, --- U.S. ---, 126 S.Ct. 1695 (2006) (finding that in a Bivens action, petitioner must plead an absence of probable cause in order to proceed under malicious prosecution under 42 U.S.C. 1983). Furthermore, "[i]n order to find that a respondent procured a prosecution, the petitioner must establish 'a chain of causation' linking the respondent's actions with the initiation of criminal proceedings" *Moore v. U.S.*, 213 F.3d 705, 710 (C.A.D.C.2000). One can hardly argue in the instant case, that this has not occurred.

A look at the Arrest Affidavit shows that the Charges read as "Offering to Commit Prostitution", the Statute as "796.07" and the Violation of Section reads "37-1" which refers to an enabling

ordinance under the code of the City of Miami, which permits, the officer to prosecute a respondent relying a state law misdemeanor by reference, through Miami's code. *State ex rel. McFarland v. Roberts*, 74 So. 2d 88 (Fla. 1954). This ordinance reads that it is "unlawful to commit, within the city, any act which is recognized by the laws of the state as a misdemeanor, as set out in the Florida Statutes." Charter and Code, City of Miami, Florida, Section 37-1. The use of this code allowed the police to prosecute Petitioner by affidavit under Fla. R. Crim. P. 3.140 (a):

> "In circuit courts and county courts, prosecution shall be solely by indictment or information, except that prosecution in county courts for violations of municipal ordinances and metropolitan county ordinances may be by affidavit or docket entries and prosecution for misdemeanors, municipal ordinances, and county ordinances, may be by notice to appear issued and served pursuant to rule 3.125." (Emphasis added.)

The affidavits of Melissa Stuckey and Jorge Hugo Gomez, characterize Petitioner as a "john" instead. The trial court assumed that Jorge Hugo Gomez was allowed to rely on statements that Petitioner was acting as a "john" to find that both Stuckey and Gomez had probable cause that charge Petitioner as a prostitute. Therefore the district court found that Commander Gomez had probable cause to prosecute Petitioner for a crime he clearly did not commit.

To reiterate, Commander Gomez stated in his affidavit:

> "I reviewed the facts sworn to by OFFICER MELISSA STUCKEY and determined that the facts constituted the necessary elements to charge Adrean Lans with the offense of offering to commit prostitution, and accordingly, I notarized the Complaint/Arrest Affidavit…. "

Affidavit of Commander Jorge Hugo Gomez, Pg 2. (Emphasis added.) Then he had Petitioner to sign the arrest

affidavit, transforming it into a notice to appear issued and served pursuant to rule 3.125. This was a second manner of prosecuting this charge against Petitioner, resulting in no need for the State to proceed by Information or Indictment. Fla. R. Crim. P. 3.140 (a).

However, Fla. Stat. § 796.07 (2)(e), offering to commit prostitution, is a crime that is used to arrest prostitutes. The language reads as follows:

> "To offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation."

Fla. Stat. § 796.07 (2)(e). Prostitution itself, is defined as "the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses." Fla. Stat. § 796.07 (1)(a). Therefore, it is implicit that to offer to commit or engage in prostitution, means that the offeror (a prostitute) must necessarily must be the one to offer to hire out his or her body to an offeree (a john). *Id.*

The importance of narrowly reading prostitution, is clear from case law, because the evidence may necessarily turn to speech that may or may not fall within First Amendment rights. If left vague, a prostitution statute would permit freely "policemen, prosecutors, and juries to pursue their personal predilections." *See Kolender v. Lawson*, 461 U.S. 352, 358, (1983) (*quoting Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Houston v. Hill*, 482 U.S. 451, 465, and n. 15 (1987). The words in the section defining a Florida crime shall be strictly construed and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Fla. Stat. § 775.021.

Therefore, when determining probable cause, offering cannot be considered synonymous with soliciting. Id. The prostitution statute additionally has to be narrowly construed so as to not prohibit consenting adults from engaging in sex. *See Roe v. Butterworth*, 958 F. Supp. 1569 (S.D. Fla.), *affirmed*, 129 F.3d 1221 (11th Cir. 1997) (rejected constitutional challenge to the prostitution statute yet narrowed reading to avoid vagueness or overbreadth), *cert. denied*, 523 U.S. 1024 (1998).

REASONS FOR GRANTING THE PETITION

The Seventh Amendment does not permit a casual waiver of the right to a jury trial that is not knowing and intelligent on the part of the Petitioner, but the Circuits are divided on this issue and this Court needs to resolve the confusion, because some circuits are increasingly inclined to find a constructive waiver in violation of Rules 38 and 39 of the Federal Rules of Civil Procedure – this Court needs to resolve the question of that split which is one of great importance.

Additionally a trial court should be duty bound to investigate the facts supporting a motion for recusal when a Petitioner just learns of the facts that provide the basis, following the trend of the Fifth and Seventh Circuits at looking at the basis for the timing rather than routinely dismissing many motions as untimely out of convenience – this is a issue of importance with respect to the public's regard for the propriety of the judiciary.

Thirdly a trial court that denies a motion for continuance, abuses his discretion when health and safety of the Petitioner's witnesses are in jeopardy, and as such, this is important, because this decision squares at odds with the decision of the Fourth Circuit, which does find an abuse has occurred when health is at risk and with the Fifth and Seventh Circuit, when the decision results in manifest injustice – this Court should resolve the uniformity of existing precedent on this matter.

Lastly, probable cause for any charge should never be sufficient to defeat a claim of malicious prosecution because this would leave a party responsible for initiating a baseless prosecution with the ability to have their actions retroactively validated – this makes more sense in the realm of false arrest, not malicious prosecution and the Court needs to resolve the confusion in the courts on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

Adrean Lans
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February 25, 2007

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN-KLEIN

ADREAN LANS,)
Plaintiffs)
)
vs.)
)
MELISSA STUCKEY,)
et. al.)
Defendants)
_____)

ORDER DENYING PLAINTIFF'S MOTIONS TO COMPEL

THIS CAUSE came before the Court for a hearing on June 23, 2005, upon Plaintiff's Motions to Compel Defendants Melissa Stuckey and Jorge Hugo Gomez to Comply with Subpoenas Duces Tecum (D.E. Nos. 40, 42), both of which were filed on May 13, 2005. Defendants failed to file timely responses, so the Court issued an Order to Show Cause why Plaintiff's motions should not be granted by default (D.E. No. 54). In response, Defendants promptly filed Responses (D.E. Nos. 56, 57) advising that 1) defense counsel was not served with a copy of Plaintiff's motions to compel, had only learned of the pendency of the motions a few days earlier, and had followed up by writing to Plaintiff to determine what discovery request was pending; 2) that both Defendants appeared at their depositions on March 30, 2005, provided what documentation they had in response to Plaintiffs subpoena duces tecum, and stated under oath they did not have any others; 3) all records in Defendants' personnel files had been made available to Plaintiff for copying an inspection; and 4) thus all records requested had been produced, were available for inspection not exist.

After considering the motions and responses, the file, and the arguments of Plaintiff and defense counsel, and being otherwise fully advised, the Court DENIES both of Plaintiff's motions to compel for

the reasons stated on the record in open court, which are summarized below.

First, Plaintiff's motion to compel is untimely. He complains that Defendants failed to bring the documents he requested to their depositions on March 30, 2005. Local Rule 26.1.H.1 provides that motions to compel shall be filed within thirty (30) days of the occurrence of grounds for the motion, and that failure to make a timely filing, absent a showing of reasonable cause for a later filing, may constitute a waiver of the relief sought. The instant motions to compel, filed on May 13, 2005, were untimely, and Plaintiff has not shown reasonable cause for their late filing.

Second, Plaintiff failed to comply with the conferring and certification requirements of Local Rule 7.1.A.3. Under this rule, prior to filing his motions to compel, Plaintiff was required to confer with opposing counsel in a good faith effort to resolve by agreement the issues to be raised in the motions, and to make certification of that fact at the time the motions were filed. Had Plaintiff conferred with opposing counsel, he would have learned that she never received the motions to compel, and perhaps they ultimately would have been able to reach an agreement and render this briefing unnecessary.

Third, Local Rule 26.1.H.2 requires a party filing a motion to compel to set forth each request for production made of the opposing party, and that party's response, in the body of the motion. Plaintiff has failed to comply with this requirement.

Fourth, Plaintiff's request for documents from these Defendants -- made through subpoenas duces tecum[1] -- does not comport with the rules of civil procedure. When a party seeks production of documents in connection with the deposition of a party in the action, the requirements of Rule 34 apply. *See* Fed. R. Civ. P. 30(b)(5) ("The procedure of Rule 34 shall apply to the request [for production of documents and tangible things at the taking of a party's deposition]."). Plaintiff should have served these Defendants with written requests for production of documents, not subpoenas duces tecum.

Fifth, even if the Court were to construe the subpoenas duces

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[1] Plaintiff stated in the motions to compel that subpoenas duces tecum were attached thereto, but none were. The subpoenas duces tecum were filed separately at the same time the motions were filed.

tecum as Rule 34 requests for production of documents, the time constraints established in Rule 34 apply. Defendants were permitted up to thirty (30) days in which to serve responsive materials. See Fed. R. Civ. P. 34(b) ("The party upon whom the request is served shall serve a written response within 30 days after the service of the request.") Plaintiff could not shorten this thirty-day response period by attaching a "request for production of documents" to a notice of taking deposition. The thirty-day response period ended after March 30, 2005, so Defendants were not obligated to bring the requested documentation to their depositions.

Sixth, some of the documents Plaintiff asked for, such as personnel files, are materials which police officers typically do not have in their possession and over which they have no control. Personnel files belong to Defendant City of Miami, not to individual officers. A request for such documentation should have been (but apparently was not) directed to the City.

Seventh, counsel for the City represented at today's hearing that she has made these Defendants' personnel files available to Plaintiff, but that he has not availed himself of the opportunity to inspect and copy the records. As for other documents Plaintiff seeks, he acknowledges that both Defendants provided some documentation at their March 30, 2005, depositions, both advised Plaintiff that they did not have other documents responsive to his requests, and both referred Plaintiff to their City of Miami personnel files. *See* Mot. to Compel Gomez to Comply (D.E. No. 40) at 2-3; Mot. to Compel Stuckey to Comply (D.E. No. 42) at 2.

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that

1) Plaintiff Adrean Lans' Motion to Compel Defendant Jorge Hugo Gomez to Comply with His Subpoena Duces Tecum (D.E. No. 40) is DENIED.

2) Plaintiff Adrean Lans' Motion to Compel Defendant Melissa Stuckey to Comply with His Subpoena Duces Tecum (D.E. No. 42) is DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 23rd day of June, 2005.

ENTERED: JUN-23-2005

/s/
THEODORE KLEIN

UNITED STATES
MAGISTRATE JUDGE

Copy to: District Judge Jordan
All counsel of record
Adrean Lans, *pro se*,
P.O. Box 01-5092, Miami, FL 33101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN

ADREAN LANS,)
Plaintiffs)
)
vs.)
)
MELISSA STUCKEY,)
et. al.)
Defendants)
_____)

ORDER

Defendants' motions for an extension of time for filing pre-trial stipulations and proposed jury instructions [D.E. 60, 64] are DENIED AS MOOT. Defendants' unilateral pre-trial stipulations [D.E. 68] and unilateral proposed jury instructions [D.E. 69] have been already filed. Defendants' motion for continuance of trial [D.E. 60, 64] is DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 8th day of September, 2005.

ENTERED: SEP-9-2005

/s/
Adalberto Jordan
United States District Judge

Copy to: Magistrate Judge Klein
All counsel of record
Adrean Lans, *pro se*,
P.O. Box 01-5092, Miami, FL 33101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN

ADREAN LANS,
Plaintiffs

vs.

MELISSA STUCKEY, et. al.
Defendants

ORDER ON DEFENDANTS, OFFICERS DONALD LAGO, ARIEL SAUD, SALVADOR LOZANO AND COMMANDER JORGE HUGO GOMEZ'S MOTION FOR SUMMARY JUDGMENT

On July 22, 2005, Officers Donald Lago, Ariel Saud, Salvador Lozano, and Commander Jorge Hugo Gomez (collectively "the officer defendants")[2] moved for summary judgment on Counts I, III and IV of Adrian Lans' first amended complaint (the "complaint").[3] *See* Defendants, Officers Donald Lago, Ariel Saud, Salvador Lozano and Hugo Gomez's Motion for Summary Judgment ("Officer Defendants' Summary Judgment Motion") [D.E. 48]. That motion was fully briefed and a hearing was held on September 15,

[2] The remaining officer defendant is Officer Melissa Stuckey. She has not moved for summary judgment and concedes that there are genuine issues of material fact as to all of Mr. Lans' claims against her.

[3] Count II is a false arrest/false imprisonment claim against the City, based on respondeat superior liability and Count V is a claim under 42 U.S.C. § 1983 against the City. The City moved for summary judgment on count V only [D.E. 47]. I discuss the City's motion as to Count V in a separate order.

2005. *See* Lans' Response [D.E. 71]; Officer Defendants' Reply [D.E. 80]; Lans' Response to Officer Defendants' Reply [D.E. 86]. Count I of Mr. Lans' complaint is based on 42 U.S.C. § 1983. Mr. Lans claims that he is entitled to damages under §1983 from each of the officer defendants because they violated his rights under the Fourth and Fourteenth Amendments by falsely arresting him. The officer defendants each raise the qualified immunity defense as to Count I, claiming that they were objectively reasonable in stopping, arresting, and using force upon Mr. Lans. The motion for summary judgment on Count I is DENIED as to Officer Lago and GRANTED as to Officers Saud, Lozano and Commander Gomez.

Count III is for false arrest/false imprisonment and Count IV is for malicious prosecution both arising under Florida law (the "state law claims"). The officer defendants each raise the sovereign immunity defense as to both counts, claiming that they were acting in the scope of their employment and not acting in bad faith, with malicious purpose or with willful and wanton disregard. The motion for summary judgment on counts III and IV is DENIED as to Officer Lago and GRANTED as to Officers Saud, Lozano and Commander Gomez.

FACTS

As the officer defendants have moved for summary judgment, factual disputes must be resolved in favor of the non-moving party, Mr. Lars. *See Harris v. Coweta County*, 406 F.3d 1307, 1311 (11th Cir. 2005); *Holmes v. Kucynda*, 321 F.3d 1069, 1073 (11th Cir. 2003). Thus, the facts, solely for purposes of this summary judgment motion, are as follows.

In response to complaints by local businesses about the high rate of prostitution in the area, the City of Miami Police Department set up a reverse sting prostitution solicitation operation. Affidavit of Melissa Stuckey ("Stuckey Aff.") at ¶ 4 [D.E. 51]. On September 5, 2001, all of the officers involved in the reverse sting operation were briefed as to the procedure for the operation. *Id.*; Affidavit of Salvador Lozano ("Lozano Aff.") at ¶ 5 [D.E. 50]. The operation involved a decoy posing as a prostitute - Officer Stuckey - an unidentified "eyeball" officer, and an arresting officer, Officer Lago. Lozano Aff. at ¶ 5; Stuckey Aff. at ¶ 5. The decoy would give a "takedown" signal to the "eyeball" officer, who would then

communicate to the arresting officer over radio that the signal was given. Stuckey Aff. at ¶ 5. The arresting officer would then stop the solicitor and arrest him. *Id.* The "takedown" signal was determined at this briefing. Id.; Lozano Aff. at ¶ 6.

On the evening of September 5th, around 9:45 pm, Mr. Lans was driving his truck southbound on NW 32nd avenue. Deposition of Adrian Lans ("Lans Depo.") at 82 [D.E. 49]. He stopped his vehicle near the intersection of NW 32nd avenue and NW 36th street when he noticed Officer Stuckey in plain clothes. *See id.* at 46, 83. Officer Stuckey was standing at a bus stop on the northbound side of NW 32nd avenue near the intersection of NW 32nd avenue and NW 36th street. *See id.* at 82. Mr. Lans, a former City of Miami police officer, knew Officer Stuckey was a police officer. *Id.* at 78, 83. While stopped, Mr. Lans asked Officer Stuckey if she wanted a ride because it was drizzling rain. *See id.* at 46, 81, 82-83. Officer Stuckey refused and skid "No, you might be the police." *Id.* at 47, 82-83. Officer Stuckey then directed Mr. Lans to make a U-turn on NW 32nd avenue. *Id.* at 49. Mr. Lans then proceeded south from the intersection a short distance, made a U-turn, and stopped in front of the bus stop where Officer Stuckey was standing. *See id.* at 49. 84. Mr. Lans pulled over slightly in front of the bus stop to avoid obstructing traffic. *Id.* at 85. Officer Stuckey grabbed the side-view mirror on the passenger side of Mr. Lans' car and asked what he wanted as Mr. Lans began to drive forward northbound on NW 32nd avenue. *See id.* at 49, 51, 84. Mr. Lans said that he did not want anything from her and was only offering a ride. *Id.* at 49, 51. Mr. Lans then started to drive away. *Id.* at 53. As Mr. Lans started to leave, Officer Stuckey gave the pre-determined "takedown" signal to the unidentified "eyeball" officer. Stuckey Aff. at ¶ 6; Affidavit of Donald Lago ("Lago Aff.") at ¶ 8. They "eyeball" officer then radioed Officer Lago with information about Mr. Lans and the vehicle he was driving so that Officer Lago could perform the "takedown." Lago Aff. at ¶ 8. Two marked police vehicles then came up and drove in front of Mr. Lans, obstructing his path as he was traveling northbound on N W 32nd avenue. *See* Lans Depo. at 53, 55-56. Mr. Lans and the two police vehicles then pulled over to the right into a lot at 3701 NW 32nd avenue (the "lot"). *See id.*
Mr. Lans stepped out of his vehicle. Id. The two officers, Officer Lago and the unidentified "eyeball" officer, exited their respective vehicles. *See id.* at 54. Officer Stuckey also was present at the lot.

See id. at 55. Officer Lago pushed Mr. Lans against his truck, patted Mr. Lans down, pulled Mr. Lans' wallet and one of Mr. Lans' two cellular phones out of Mr. Lans' pockets, and looked inside the wallet. *See id.* at 27, 55, 57, 58-59. Then, a fourth officer, Officer Saud, arrived in his own vehicle and observed. *Id.* at 55. Mr. Lans stood for five to ten minutes against the truck. *Id.* at 79-80. Mr. Lans was never handcuffed by any of the police officers. *Id.* at 56. Mr. Lans asked Officer Lago, "Are you arresting me?," to which Officer Lago responded, "No, Melissa [Stuckey] said to let you go." *Id.* at 54, 55, 58, 59, 90. Officer Lago then returned the wallet to Mr. Lans. Id. at 58. Mr. Lans entered his truck and began to leave the lot. *Id.* at 55, 58.

After he drove about two car lengths northbound on NW 32nd avenue, Mr. Lans realized that Officer Lago did not return the phone. Lans Depo. at 60. Mr. Lans reversed back into the lot, stepped out of his truck and asked Officer Lago to give the phone back. *Id.* at 61. Officer Lago refused to return the phone and responded, "The sergeant wants to see who you are," to which Mr. Lans responded, "Tell the sergeant to come to the scene so that I can explain what's going on and what you guys are doing over here." *Id.* at 27, 56, 59, 62-63. Officer Lago told Mr. Lans to get in the back of Officer Lago's car, but did not handcuff Mr. Lans. *Id.* at 27, 63. Mr. Lans sat in the back of Officer Lago's car and Officer Lago drove Mr. Lans to the Allapattah police mini-station (the "station"). *Id* at 63. Officer Saud drove Mr. Lans' truck to the station. *See id.* at 27, 56-57.[4]

Commander Gomez and Officer Lozano were both present at the station when Mr. Lans arrived. Neither was at the scene of Mr. Lans' arrest. *Id.* at 64, 67. That evening, Commander Gomez was the supervisor of the Allapattah Problem Solving Team and in charge of prostitution detail. Affidavit of Commander Jorge Hugo Gomez ("Gomez Aff.") at ¶ 3. Officer Stuckey, under oath, told Commander Gomez that Mr. Lans offered her twenty dollars in exchange for oral

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[4] Whether Officer Saud began to drive Mr. Lans' truck before or after Mr. Lans was arrested by Officer Lago is unclear. Mr. Lans suggests in his deposition that Officer Saud jumped into the truck before he was put in the back of Officer Lago's car and drove away. Lans Depo. at 27, 56-57. However, Mr. Lans also agreed that Officer Saud followed Officer Lago to the station. *See id.* at 64.

sex. Id at T 5; Stuckey Aff. at ¶¶ 6, 7. Commander Gomez found that Officer Stuckey's sworn statement provided probable cause to charge Mr. Lans with offering to commit prostitution, a second-degree misdemeanor under Fla. Stat. § 796.07. Gomez Aff. at ¶ 5. Commander Gomez thus notarized Mr. Lans' arrest affidavit. *Id.* Mr. Lans signed the arrest affidavit solely to cooperate and not admit guilt. Lans Depo. at 69-70. Officer Lozano prepared the impoundment slip and Mr. Lans' truck was impounded. Lozano Aff. at ¶ 7. Officer Lozano filled out the slip in reliance on information given to him by his fellow officers directly involved in the sting operation. Id. at ¶ 9.

Besides observing the incident at the lot and driving Mr. Lans' truck from the lot to the station, Officer Saud did not have any other involvement with the incident. *See* Lans Depo. at 55-57, 67. Mr. Lans had no money or condoms in his possession the night of his arrest. *Id.* at 71, 89, 98. He never offered Officer Stuckey any money for a sexual favor or act. *Id.* at 85, 89. He has since suffered an aggravation of several preexisting injuries to his neck, back and knee. *See id.* at 28, 79. He suffered no bruises. *Id.* at 80. The charge against Mr. Lans was eventually nolle prosequied, i.e., dropped. *Id.* at 75.

LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ...the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). All of the evidence and all factual inferences therefrom are viewed in the light most favorable to the nonmoving party and all reasonable doubts about the evidence are resolved in favor of the non-moving party. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *Brosseau v. Haugen*, 125 S.Ct. 596, 597 n. 2 (2004); *Kingsland v. City of Miami*, 382 F.3d 1220, 1225-26 (11th Cir. 2004). Thus, on summary judgment, I am bound to accept Mr. Lans' version of any disputed facts. *Rowe v. City of Ft. Lauderdale*, 279 F.3d 1271, 1279 n. 9 (11th Cir. 2002). I can only grant the officer defendants summary judgment if, viewing the evidence in the light most favorable to Mr. Lans, a jury could not reasonably find in his favor on the claim at issue. *Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986).

ANALYSIS
I. § 1983 CLAIM

Count I of the complaint alleges that Officers Lago, Saud, Lozano and Commander Gomez violated Mr. Lans' rights under the Fourth and Fourteenth Amendment, and thus are liable to him under § 1983, because they each took part in illegally arresting him. See First Amended Complaint at ¶¶ 13-20 [D.E. 22].

Each of the officer defendants raise the qualified immunity defense to § 1983 liability for a violation of constitutional rights. The doctrine of qualified immunity shields a police officer from § 1983 liability as long as the officer's discretionary act does not violate a clearly established constitutional right. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). First, the officer must show that his acts were within the scope of his discretionary authority. *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988); *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990). If the officer meets this initial burden, then the burden shifts to the plaintiff. *Rich*, 841 F.2d at 1563.[5] The plaintiff then faces a two-step inquiry. First, he must show that the officer violated a constitutional right. *Saucier*, 533 U.S. at 201; *Brosseau*, 125 S.Ct. at 597. If no constitutional right was violated, the inquiry ends and the officer cannot be liable under 1983. *Saucier*, 533 U.S. at 201. If the court finds that the officer did violate the plaintiffs constitutional right, the plaintiff must next show that it was a violation of clearly established law. *Id.* When these rules are applied at summary judgment, the evidence is viewed in the light most favorable to the plaintiff and all factual disputes are resolved in the plaintiffs favor. *Brosseau*, 125 S.Ct. at 598.

A. OFFICER LAGO

Mr. Lans originally claims that Officer Lago violated his constitutional rights and is liable to him under § 1983 for falsely arresting him. *See* First Amended Complaint at ¶ 18. However, the parties' memoranda address Officer Lago's stop, arrest and use of

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[5] There is no question that all of the officers involved where performing discretionary acts. Each officer's actions "were undertaken pursuant to the performance of his duties and within the scope of his authority" as a police officer. *Rich*, 841 F.2d at 1564.

force. *See* Officer Defendants' Summary Judgment Motion at 8-10; Officer Defendants' Reply at 2, 4; Lans' Response to Officer Defendants' Reply at 2-4. Thus, I address whether Officer Lago is entitled to qualified immunity for the stop, arrest and force used.

1. STOP

According to Mr. Lans' version of events - which must be taken as true on summary judgment - the stop violated Mr. Lans' Fourth Amendment right against unreasonable seizures because Officer Lago did not have reasonable suspicion to stop Mr. Lans. The Fourth Amendment permitted Officer Lago to stop Mr. Lans if he had a reasonable suspicion that Mr. Lans had just committed a criminal act. *United State v. Hensley*, 469 U.S. 221, 227 (1985). The only criminal act that Officer Lago appeared to stop Mr. Lans for was offering to commit prostitution. *See generally* Lago Aff. However, Officer Lago's suspicion that Mr. Lans offered to commit prostitution was entirely based on what the "eyeball" officer told him, which was based entirely on Officer Stuckey's signal to the "eyeball" officer. *See id.* at ¶ 6.

When an officer stops a suspect based solely on information received from other officers, the constitutionality of the stop depends on whether the officer issuing the information has reasonable suspicion. *Hensley*, 469 U.S. at 227. In *Hensley*, an officer stopped the defendant in reliance on a police issued flyer stating that the defendant was wanted for an aggravated robbery. *Id.* at 223. The Supreme Court held that the stop was constitutional as long as the officer issuing the flyer had a reasonable suspicion that the defendant committed the robbery. *Id.* at 232. Thus, the constitutionality of the stop "turns on whether the officers who issued the flyer possessed probable cause to make the arrest." *Id.* at 231 (emphasis in original). *See also Rogers v. Powell*, 120 F.3d 446, 453 (3d Cir. 1997) ("The legality of a seizure based solely on statements issued by fellow officers depends on whether the officers who issued the statements possessed the requisite basis to seize the suspect") (citing *Hensley*) (emphasis in original); *United States v. Colon*, 250 F.3d 130, 135-36 (2d Cir. 2001) ("The primary focus in the imputed knowledge cases is whether the law enforcement officers initiating the search or arrest, on whose instructions or information the actual searching or arresting officers relied, had information that would provide

reasonable suspicion or probable cause to search or arrest the suspect.") (citing *Hensley*) (emphasis added). Thus, whether Officer Lago's stop violated Mr. Lans' Fourth Amendment right against unreasonable seizures depends entirely on 'whether the officer that issued the information Officer Stuckey - had a reasonable suspicion that Mr. Lans offered to commit prostitution.

The facts according to Mr. Lans, are devoid of any basis for Officer Stuckey's suspicion. Mr. Lans recognized Officer Stuckey from the police force and asked her if she needed a ride. *See* Lans Depo. at 78, 83. Mr. Lans clarified that he was only offering to give Officer Stuckey a ride. *See id.* at 49, 51. Officer Stuckey was standing at a bus stop on a rainy night. *See id.* at 46. Mr. Lans never offered Officer Stuckey money for sex. *Id.* at 85, 89. There were thus no specific, articulable facts that Mr. Lans was offering to commit prostitution. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). The mere fact that Officer Stuckey knew the area to have a high prostitution rate was not sufficient to give her reasonable suspicion that Mr. Lans was soliciting prostitution, especially since Mr. Lans clarified that he was only offering Officer Stuckey a ride and did not want anything from her. Stuckey Aff. at ¶ 4. Since the officer issuing the information - Officer Stuckey - lacked reasonable suspicion, the stop by Officer Lago violated Mr. Lans' Fourth Amendment right against unreasonable seizures. *See Hensley*, 469 U.S. at 231 (if the officer issuing the information lacks reasonable suspicion, then the stop made in reliance on the information is an unconstitutional seizure). The first inquiry is thus complete. *See Saucier*, 533 U.S. at 201 (once it is determined that the plaintiff's constitutional rights were violated, the court should proceed to determine if the right violated was clearly established).

Although the stop violated Mr. Lans' Fourth Amendment right, Officer Lago is shielded from liability if the right violated was not clearly established at the time of the stop. In dicta, the Court in Hensley stated that an officer may be immune from civil liability if he objectively relies in good faith on information that was issued in the absence of reasonable suspicion. *Hensley*, 469 U.S. at 232 ("In such a situation, of course, the officers making the stop may have a good faith defense to any civil suit."). Thus, an officer does not violate a clearly established right and is entitled to qualified immunity for an investigatory stop if he had "arguable" reasonable suspicion for the stop. *Jackson v. Sauls*, 206 F.3d 1156, 1165 (11th

Cir. 2000). An officer "who reasonably, but mistakenly concludes that reasonable suspicion is present is still entitled to qualified immunity." *Id. See also Rogers*, 120 F.3d at 456 (officer entitled to qualified immunity for arrest where it was objectively reasonable for him to rely on fellow officer's clear and unambiguous statement that there was a warrant out for plaintiff s arrest); *Brandenburg v. Murphy*, 936 F.2d 572 (Table), 1991 WL 109374, **3 (6th Cir. 1991) (officer entitled to qualified immunity where he reasonably relied upon information communicated to him by police dispatcher and fellow officer to conclude probable cause existed to arrest plaintiff).

Officer Lago is immune from liability to the extent of the initial stop because the stop was at least supported by arguable reasonable suspicion, and thus, did not violate a clearly established Fourth Amendment right. Officer Lago was involved in a reverse sting prostitution solicitation operation in an area known for prostitution. Stuckey Aff. at ¶ 4. Mr. Lans cannot dispute - as he has no personal knowledge of the matter- that Officer Stuckey gave the "takedown" signal to the "eyeball" officer who, in turn, told Officer Lago to stop Mr. Lans over radio. Stuckey Aff. at ¶ 6; Lago Aff. at ¶ 8.[6] Officer Lago did not proceed to stop Mr. Lans until he received a direct communication from the "eyeball" officer with specific information describing Mr. Lans and the vehicle he was driving.

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[6] In his affidavit, Mr. Lans claims that "Officer Lago was not informed by the `eyeball' officer that Officer Stuckey gave a pre-determined signal." Affidavit of Adrian Lans ("Lans Aff.") at ¶¶ 9-10 [D.E. 67]. I cannot consider this statement as evidence on summary judgment because it is not at all clear how it could be based on personal knowledge. In order to be considered on summary judgment, an affidavit must be based on personal knowledge. FED. R. CIV. P. 56(e). Even when the evidence is viewed in the light most favorable to Mr. Lans, there is no evidence that he personally knew what the "takedown" signal was, what the "eyeball" officer or Officer Lago saw, or what the "eyeball" officer said to Officer Lago. In fact, Mr. Lans admits that he "did not have a radio or anything" and thus, could not possibly know what any of the officers involved said to one another prior to stopping him. Lans Depo. at 63. Mr. Lans' belief is not sufficient to create an issue of fact. *See Pace v. Capobianco*, 283 F.3d 1275, 1278-79 (11th Cir. 2002).

Lago Aff. at ¶ 8. Officer Lago was acting in good faith reliance on directions from the "eyeball" officer. Although mistaken, he reasonably concluded that Mr. Lans solicited prostitution from Officer Stuckey and thus, is entitled to qualified immunity for the initial stop. *See Jackson*, 206 F.3d at 1165 (officer entitled to qualified immunity where he reasonably, but mistakenly concludes that there is reasonable suspicion to stop).

2. ARREST

Mr. Lans also claims that Officer Lago is liable to him in damages under § 1983 because Officer Lago unconstitutionally arrested him. See First Amended Complaint at ¶ 13, 20. According to Mr. Lans' version of events, Officer Lago's arrest was unconstitutional because it was not based on probable cause. A warrantless arrest not based on probable cause is unconstitutional. *Jones v. Cannon*, 174 F.3d 1271, 1283 (11th Cir. 1999). As Officer Stuckey lacked probable cause to arrest, so did Officer Lago. *See Hensley*, 469 U.S. at 231 (if the officer issuing the information lacks probable cause, so does the arresting officer who relies exclusively on the information). Moreover, any shred of probable cause that Officer Lago could have was vitiated when Officer Stuckey told him to let Mr. Lans go. *See* Lans Depo. at 54, 55, 58, 59, 90. Thus, the arrest was unconstitutional and the first inquiry is complete. *See Saucier v. Katz*, 533 U.S. at 201.

The arrest also violated clearly established law. The arrest is in violation of "clearly established law" if it is not supported by arguable probable cause, i.e., if a reasonable police officer, knowing what Officer Lago knew, could not have believed there was probable cause to arrest Mr. Lans for offering to commit prostitution. *See Kingsland*, 382 F.3d at 1232; *Jones*, 174 F.3d at 1283; *Von Stein v. Brescher*, 904 F.2d 572, 580 (11th Cir. 1990).

The arrest is controlled primarily by the Eleventh Circuit's recent decision in *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir. 2004). In *Kingsland*, an officer and a young woman driving a rental truck collided at an intersection, each asserting that the other ran a red light. *Id.* at 1223. When officers arrived at the scene, they did not ask the plaintiff, Kingsland, for a statement or speak to any witnesses. *Id.* They ignored Kingsland's assertions that she was injured, dizzy and sick and that the officer with whom she collided

was at fault. *Id.* at 1224, 1229. An officer administered a field sobriety test, which she failed. *Id.* at 1224. She was subsequently arrested and charged with DUI. *Id.* at 1225. The charge was later dropped and Kingsland sued the officers under § 1983 for false arrest. *Id.*

The Eleventh Circuit denied the officers summary judgment on their qualified immunity defense. *Id.* at 1236. The officers lacked arguable probable cause because they "consciously and deliberately did not make an effort to uncover reasonably discoverable, material information..." *Id.* at 1230. Reasonable officers in the same circumstance, possessing the same knowledge as these officers, would have "chosen to investigate" before arresting and charging Kingsland with DUI. *Id.* at 1232.

The facts as described by Mr. Lans support the same conclusion in this case. Officer Lago, like the officers in Kingsland, faced obviously exculpatory evidence. Officer Lago's sole source of probable cause - Officer Stuckey - told Officer Lago to let Mr. Lans go. Lans Depo. at 54, 55, 55, 58, 59, 90. In fact, Officer Lago initially let Mr. Lans go. *See id.* Officer Lago also knew that the "eyeball" officer was watching for a signal at night in the drizzling rain and thus, could have misread the signal. *See id.* at 46; Lago Aff. at ¶¶ 3, 5. Additionally, Mr. Lans demanded that the "Sergeant come out to see what you guys are doing here," implying that he was wrongfully stopped. Lans Depo. at 27, 56, 59, 62-63. Officer Lago searched Mr. Lans' pockets and wallet and probably saw that Mr. Lans had no money or condoms. *See id.* at 27, 55, 57-59, 71, 89, 98. A reasonable officer (who was at the lot) would ask Officer Stuckey why Mr. Lans should be let go or ask Mr. Lans for a statement. *See Kingsland*, 382 F.3d at 1230 (an officer may not "exclusively rely" on only some information and disregard the "totality of the circumstances" in determining probable cause).

In other contexts, police officers have lost qualified immunity for § 1983 false arrest claims where they disregarded information that there was no probable cause to arrest. In *Rogers v. Powell*, 120 F.3d 446 (3d Cir. 1997), two officers took custody of the plaintiff from the neighboring county's police because the plaintiff had an outstanding warrant at the prison. *Id.* at 451. The officers went to a police barracks where one spoke with a prosecutor, who said that there was no outstanding warrant and that the plaintiff should be let go. *Id.* Yet, the plaintiff stayed in custody for at least another hour.

Id.

The Third Circuit held that the officers were not entitled to qualified immunity for the arrest beyond the time the officer spoke with the prosecutor. *Id.* at 456. It reversed the district court's grant of summary judgment in favor of the officers because continuing to hold an individual "once it has been determined that there was no lawful basis for the initial seizure is unlawful within the meaning of the Fourth Amendment." *Id.* at 456-57. *See also Jones*, 174 F.3d at 1283-84 (officers not entitled to summary judgment for qualified immunity where they proceeded to arrest suspect for murder after state attorney told one officer that there was no probable cause for the arrest).

Officer Stuckey is as reliable a source as the assistant state attorneys in *Rogers* and *Jones*. She was the only officer on the scene with personal knowledge as to whether Mr. Lans solicited prostitution. Thus, once she stated that Mr. Lans should be let go, Officer Lago should have known that there was no lawful basis to continue holding Mr. Lans. Unlike the state attorneys in *Rogers* and *Jones*, Officer Stuckey did not tell Officer Lago in explicit terms, "You do not have probable cause to arrest." She merely said, "Let him go." However, it is reasonable to infer that she intended to tell Officer Lago that Mr. Lans did not solicit prostitution from her, particularly since Officer Lago initially let Mr. Lans leave. Rogers and Jones thus require that Officer Lago be denied qualified immunity for ignoring Officer Stuckey's advice or instruction. At the very least, *Kingsland* requires that Officer Lago at least have asked a simple investigative question, such as, "Why should I let him go?" to quickly verify that no mistake was made. His failure to do so was unreasonable and thus, his arrest of Mr. Lans violated clearly established law. Thus, Officer Lago is not entitled to summary judgment on the basis of qualified immunity as to the arrest.

3. FORCE

Mr. Lans claims that he is entitled to damages under § 1983 against Officer Lago because Officer Lago violated his Fourth Amendment right against the use excessive force. *See* Lans' excessive force. Lans Depo. at 80. *See Nolin*, 207 F.3d at 1258 (officer's force was de minimis where, inter alia, plaintiff only suffered minor bruising which quickly disappeared without

treatment); *Gold*, 121 F.3d at 1446 (officer did not use excessive force in disorderly conduct arrest where plaintiff only suffered skin abrasions from being handcuffed for twenty minutes).

Mr. Lans claims that as a result of Officer Lago's force, he has suffered an aggravation of several pre-existing injuries to his neck, back and knee. *Id.* at 28, 79. Yet, there is no evidence that Officer Lago knew that Mr. Lans had a preexisting neck, back or knee condition. Officer Lago's force does not become excessive merely because he aggravated an injury which he knew nothing about. *See Durruthy*, 351 F.3d at 1095, n. 10 (plaintiff's claim that officer's force aggravated a pre-existing shoulder injury did not defeat officer's qualified immunity because otherwise reasonable force does not become excessive force when the force aggravates a preexisting condition the extent to which is unknown at the time) (quotations omitted).

Since Officer Lago did not use excessive force and, therefore, did not violate Mr. Lans' Fourth Amendment right, the inquiry ends and there is no need to address whether Mr. Lans' constitutional right was clearly established. *See Durruthy*, 351 F.3d at 1094-95 (where court determines that force used was de minimis, it "need not address whether the constitutional right at issue was clearly established"). Yet, assuming that the facts did establish that Officer Lago used excessive force, I cannot conclude that Officer Lago violated any of Mr. Lans' clearly established rights. An officer's use of force does not violate a clearly established right unless "every reasonable officer in the position of [Officer Lago would] conclude the force used was unlawful." *Parks v. City of Carollton*, 2005 WL 2219072, *6 (11th Cir. 2005) (*citing Nolin v. Isbell*, 207 F.3d 1253, 1255 (11th Cir. 2000)). Officer Lago used that force that is normally attendant to an investigatory stop. He caused no bruising, did not handcuff Mr. Lans, required that Mr. Lans stand for only five to ten minutes, and let Mr. Lans go as soon as Officer Stuckey told him to. His actions hardly constitute force that every reasonable officer would find unlawful. Thus, even if Mr. Lans' claim reaches the second inquiry under *Saucier*, it fails, and Officer Lago is entitled to qualified immunity for the force he used in effecting the stop.

B. OFFICER SAUD

Officer Saud is entitled to summary judgment on the basis of

qualified immunity for Mr. Lans' § 1983 false arrest claim because Officer Saud was not involved in arresting Mr. Lans. Officer Saud did not speak to Mr. Lans regarding whether the Sergeant would come to the scene. Officer Saud did not touch Mr. Lans. Officer Saud did not tell Mr. Lans to get in the back of any police cars. In fact, the only thing that Officer Saud did was move Mr. Lans' car without Mr. Lans' consent. Lans Depo. at 27, 56-57.

As Officer Saud did not arrest Mr. Lans, he did not violate Mr. Lans' constitutional rights and thus, receives qualified immunity. *See Saucier*, 533 U.S. at 201 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.").

C. COMMANDER GOMEZ AND OFFICER LOZANO

Both Officer Lozano and Commander Gomez are entitled to qualified immunity for Mr. Lans' § 1983 claim. Officer Lozano filled out the impound slip in reliance on information given to him by his fellow officers directly involved in the sting operation. Lozano Aff. at 1 9. Commander Gomez found that Officer Stuckey's sworn statement provided probable cause to charge Mr. Lans with offering to commit prostitution and notarized Mr. Lans' arrest affidavit. Gomez Aff. at ¶ 5. Both officers acted in good faith reliance on their fellow officers' information and Mr. Lans fails to come forward with any facts showing that they were unreasonable in doing so. For example, Officer Lozano and Commander Gomez were not at the scene of the arrest and could not have heard Officer Stuckey tell Officer Lago to let Mr. Lans go. *See Hensley*, 469 U.S. at 232; *Rogers*, 120 F.3d at 456; *Brandenburg*, 1991 WL 109374 at **3. Officer Lozano and Commander Gomez thus stand in entirely different shoes than Officer Lago. Unlike Officer Lago, they did not receive a clear statement from Officer Stuckey - or any other officer - that Mr. Lans did not solicit prostitution. Reasonable law enforcement officers, "possessing the same knowledge and in the same circumstances as [Commander Gomez and Officer Lozano] could have believed that `arguable' probable cause existed" to impound Mr. Lans' car and notarize Mr. Lans' arrest affidavit. *Von Stein*, 904 F.2d at 580.

II. STATE LAW CLAIMS

Mr. Lans raises a false arrest claim and malicious prosecution claim against each of the officer defendants. *See* First Amended Complaint at ¶¶ 26-29, 30-32. The officer defendants' only argument as to both of these claims is that they are immune from liability under the Florida sovereign immunity statute, section Fla. Stat. § 768.28(9)(a), which states in relevant part:

> No officer, employee or agent of the state or of any of its subdivisions shall be held liable personally in tort or named as a party defendant in any action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

There is no dispute that all of the officer defendants were acting in the scope of their employment. The dispute centers around whether the officer defendants acted in bad faith, with malicious purpose or with wanton and willful disregard. An officer's conduct does not fall into one of these categories merely because he committed an intentional tort. *Duyser v. School Bd. of Broward Cnty*, 573 So.2d 130, 131 (Fla. 4th DCA 1991); *Richardson v. City of Pompano Beach*, 511 So.2d 1121, 1123-24 (Fla. 4th DCA 1987). Rather, the "intent and purpose underlying the alleged actions" must be analyzed. *Searer v. Wells*, 837 F.Supp. 1198, 1202 (M.D. Fla. 1993) (applying Florida sovereign immunity statute in suit by arrestee against police officers for false arrest and excessive force).

A. WANTON AND WILLFUL DISREGARD

Wanton and willful disregard implies conduct that is "much more reprehensible and unacceptable than mere intentional conduct." *Richardson v. City of Pompano Beach*, 511 So.2d 1121, 1123 (Fla. 4th DCA 1987). Thus, "wanton and willful conduct is often associated with culpable negligence, ...[i.e.], a reckless indifference or grossly careless disregard of human life." *Sierra v. Assoc'd*

Marine Insts., 850 So.2d 582, 593 (Fla. 2d DCA 2003). *See also Thompson v. Douds*, 852 So.2d 299, 309 (Fla. 2d DCA 2003) (while no evidence of bad faith or malice, genuine issue of fact as to whether police acted with wanton and willful disregard where one officer gave plaintiff two or three "knee blasts" and several officers held plaintiff down with their body weight after he was handcuffed and bound with ropes).

There is insufficient evidence to create a genuine issue of material fact as to whether any of the officers acted with wanton and willful disregard of Mr. Lans' human rights, safety or property. *Richardson, Sierra* and *Thompson* suggest that there must be at least some evidence that Mr. Lans was physically endangered. There is no such evidence here. As discussed above in relation to Officer Lago's use of force, Mr. Lans suffered no bruising and was never handcuffed. Lans Depo. at 56, 80. Officer Lago only exerted de minimis force in pushing Mr. Lans against the truck and requiring him to stand for five to ten minutes. *Id.* at 27, 79-80 Moreover, Officer Saud's driving of Mr. Lans truck to the station exhibited no wanton or willful disregard for Mr. Lans' property. *Id.* at 55-57, 67. All of the evidence shows that Officer Saud drove directly to the station and did no damage to the truck.

B. BAD FAITH OR MALICIOUS PURPOSE

I am unable to find - and counsel does not provide - a Florida decision explicitly defining "bad faith" and "malicious purpose." However, an Ohio state court, in a similar suit by an arrestee against police officers for damages under § 1983 and state law assault, interpreted these phrases in a similar state sovereign immunity statute. *Alley v. Betancourt*, 730 N.E.2d 1067, 1075 (Ohio Ct. App. 1999). According to that court, bad faith implies a "sinister motive that has `no reasonable justification'" and malice implies a "wilful and intentional desire to harm another, usually seriously, through conduct which is unlawful or unjustified." *Id. Cf. Jarzynka v. St. Thomas Univ.*, 310 F.Supp.2d 1256, 1265 (S.D. Fla. 2004) (in student's suit against university for wrongful expulsion under Florida law, malice defined as a "wrongful act, done intentionally, without just cause or excuse"). One Florida decision suggests that at least one circumstance where malice is present is where a police officer arrests someone because of a personal dislike arising out of previous

encounters. *See City of Ft. Lauderdale v. Todaro*, 632 So.2d. 655, 656 (Fla. 4th DCA 1994).

1. OFFICER LAGO

There is sufficient evidence that Officer Lago acted in bad faith or with malicious purpose in arresting Mr. Lans. Officer Stuckey, Officer Lago's sole source of probable cause to arrest Mr. Lans, specifically told Officer Lago to let Mr. Lans go. Lans Depo. at 54, 55, 58, 59, 90. Officer Lago had no reason to doubt Officer Stuckey. Yet, he insisted on arresting Mr. Lans anyway. Moreover, as he was arresting Mr. Lans, he said, "The sergeant wants to see who you are." *Id.* at 59. Officer Lago should know that he can only arrest a suspect if he has probable cause that a crime was committed and not merely because a sergeant wants to see the suspect. This suggests Officer Lago arrested Mr. Lans with a sinister motive and lacked any reasonable justification for the arrest. *See Alley*, 730 N.E.2d at 1075 (bad faith). Alternatively, it suggests that Officer Lago arrested Mr. Lans with the intent to harm him and without any just cause or excuse. *See Jarzynka*, 310 F.Supp.2d at 1265 (malicious purpose). Thus there is a genuine issue of material fact as to whether Officer Lago arrested Mr. Lans in bad faith or with malicious purpose.

2. OFFICERS SAUD, LOZANO AND COMMANDER GOMEZ

There is insufficient evidence that Officers Saud, Lozano and Commander Gomez acted with bad faith or malicious purpose. Each of these officers had very small roles in Mr. Lans' arrest and justifiably relied on the directions and information received from their fellow officers. There is no evidence suggesting that they acted with a sinister motive or the intentional desire to harm Mr. Lans or that they acted without reasonable justification, just cause or excuse. *See, e.g., Durruthy v. City of Miami*, 2002 WL 3182958, *1 (S.D. Fla. 2002) (chief of police granted summary judgment as to state law false arrest claim on the basis of sovereign immunity where plaintiff only alleged that chief was supervisor the day of the incident and no evidence that chief was involved in the arrest).

CONCLUSION

As to the § 1983 claims, Officer Lago's motion for summary judgment is DENIED and the motion of Officers Saud, Lozano and Commander Gomez is GRANTED.

As to the state law claims, Officer Lago's motion for summary judgment is DENIED and the motion of Officers Saud, Lozano and Commander Gomez is GRANTED.

A bench trial is set for the two-week period beginning October 31, 2005. Calendar call is set for October 25, 2005, at 9:00 am.

DONE and ORDERED in chambers in Miami, Florida, this 17th day of October, 2005.

ENTERED: OCT-18-2005

/s/_____
Adalberto Jordan
United States District Judge

Copy to: Magistrate Judge Klein
All counsel of record
Adrean Lans, *pro se*,
P.O. Box 01-5092, Miami, FL 33101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN

ADREAN LANS,
Plaintiffs

vs.

MELISSA STUCKEY,
et. al.
Defendants

ORDER ON CITY OF MIAMI'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY[7]

On June 13, 2005, the City of Miami (the "City") moved for summary judgment on Count V of Adrian Lans' first amended complaint. See City of Miami's Motion for Summary Judgment [D.E. 47]. In Count 1, Mr. Lans alleges that officers Melissa Stuckey, Donald Lago, Ariel Saud, Salvador Lozano and commander Jorge Hugo Gomez (the "officer defendants") violated his Fourth Amendment and Fourteenth Amendment rights by arresting him without probable cause for soliciting prostitution on September 5, 2001. First Amended Complaint (the "complaint") at ¶¶1, 33-35 [D.E. 22]. In Count V, Mr. Lans alleges that the City is liable under 42 U.S.C. § 1983 because it failed to properly screen, train and supervise the officer defendants so as to prevent his constitutional rights from being violated. Id. at ¶ 33, a-e, g, i, k.[8] He also alleges in

[7] A complete recitation of the facts is presented in a separate order addressing the individual defendants' motion for summary judgment.
[8] Count 11 is a false arrest/false imprisonment claim under Florida law against the City based on respondeat superior liability as the

Count V that the City has adopted policies where it (a) permits officers to hide improper arrests, plant weapons and perform illegal stops and (b) fails to warn the public of rights-violating officers. *Id.* at ¶ 33, f, h, j, 1. As explained below, the City's motion for summary judgment on count V of Mr. Lans' complaint is GRANTED.

II. RELEVANT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV, P. 56(c). Where the non-moving party, Mr. Lans, fails to prove an essential element of his case for which he has the burden of proof at trial, summary judgment is warranted. *See Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986). Thus, the issue here is whether, considering the evidence in the light most favorable to Mr. Lans, there is evidence on which a jury could reasonably find a verdict, in his favor, on Count V. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

III. ANALYSIS OF CITY OF MIAMI'S § 1983 LIABILITY

To impose liability on the City for failing to act to preserve his constitutional rights under §1983, Mr. Lans must show (1) his constitutional rights were violated by the officer defendants, (2) the City had a policy or custom that constituted deliberate indifference to his constitutional rights, and (3) that the constitutional violation was caused by the policy or custom. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). The City is not liable for the officer defendants' unconstitutional acts merely because it is their employer. *See Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998) (There is "no respondent superior liability making a municipality liable for the

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officer defendants' employer. The City has not moved for summary judgment on this claim. Count III is a false arrest/false imprisonment claim and Count IV is a malicious prosecution claim, both arising under Florida law, against the officer defendants. I discuss the officer defendants' motion for summary judgment as to Counts 1, III and IV [D.E. 48] in a separate order.

wrongful acts of its police officers in making a false arrest.") (*citing Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978)). Rather, the City's liability must be based on unconstitutional customs or policies adopted by the City itself that caused the plaintiffs injury. *Gold*, 151 F.3d at 1350 (plaintiff "must identify a municipal policy or custom that caused his injury") (quotations omitted). Count V does not survive summary judgment because Mr. Lans fails to establish that the City had a policy or custom of deliberate indifference to the risk that individuals would be falsely arrested in the course of a reverse sting prostitution operation.

A. IMPROPER SCREENING OF APPLICANTS

Mr. Lans alleges that the City is liable under § 1983 because its policy of screening applicants to the police force is deliberately indifferent to the constitutional rights of its citizens and such a policy caused his constitutional rights to be violated. See Complaint at ¶ 33, a, b, d, e.

A § 1983 claim against a municipality premised on the municipality's inadequate hiring practices can only survive summary judgment if there was information in the offending officer's applications showing that it was highly likely that he would commit the alleged constitutional rights violation. *Board of County Comm'rs. v. Brown*, 520 U.S. 397, 412 (1997) ("[A] finding of culpability ...must depend on a finding that this officer was highly likely to inflict the particular injury suffered by plaintiff.") (emphasis in original).

Of the five officer defendants, Mr. Lans only presents Officer Gomez's employment application. See Application for Employment, attached as Exhibit A to Mr. Lans' Response to Defendants' Motion to Strike Complaint [D.E. 30]. Officer Gomez's two-page application states nothing about his propensity to commit a false arrest, let alone a false arrest in the context of a reverse prostitution sting. Nor does Mr. Lans present any other evidence showing that the City had notice of anything in Gomez's background showing that he was highly likely to assist in a false arrest for soliciting prostitution. As to all the other officer defendants, Mr. Lans presents no evidence of their backgrounds prior to being hired or that the City was on notice of any facts that would make them "highly likely to inflict the particular injury suffered by" Mr. Lans. *Brown*, 520 U.S. at 412.

B. IMPROPER TRAINING AND SUPERVISION OF OFFICERS

Mr. Lans also alleges that the City is liable under § 1983 because its policy of training and supervising police officers is deliberately indifferent to the constitutional rights of its citizens and such a policy caused his constitutional rights to be violated. See Complaint at ¶ 33 b, c, g, i, k.

A § 1983 claim against a municipality premised on the municipality's inadequate training and supervision practices can only survive summary judgment if there is evidence that the municipality "knew of a need to train or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Gold*, 151 F.3d at 1350. There are two bases upon which the City may be on notice of a need to train or supervise: (a) where there is a history of widespread prior abuse in a particular area to put the municipality on notice of the need to train in that area or (b) where the need to train in that area is obvious because officials face clear constitutional duties in recurrent situations. *Id.* at 1350-51; *Owens v. City of Ft. Lauderdale*, 174 F.Supp.2d 1282, 1293 (S.D. Fla. 2001).

1. WIDESPREAD PRIOR ABUSE

Mr. Lans has failed to show any history of prior false arrests in the particular area of reverse sting prostitution operations. In *Gold*, the plaintiff sued the City of Miami under § 1983 after being falsely arrested for disorderly conduct. *Gold*, 151 F.3d at 1351. He claimed the City was liable because it failed to properly train its officers in properly conducting arrests for disorderly conduct. Id. The Eleventh Circuit held that there was insufficient evidence supporting Gold's "failure to train" § 1983 claim because he could not show any prior constitutional violations or false arrests involving Florida's disorderly conduct statute. Id.

Similarly, Mr. Lans has failed to show that the City knew of a need to train its officers in conducting reverse sting prostitution operations. He has presented no evidence of any prior incidents where City of Miami police officers falsely arrested someone for soliciting prostitution, let alone in the context of a reverse sting operation.

Insofar as his claim against the City is based on the City's alleged failure to supervise its officers, it also fails. Mr. Lans does present evidence that the City was on notice of several bad acts by the officer defendants while working for the City: being absent from duty without permission, leaving one's post without permission, operating a city vehicle negligently, delivering physical evidence to the property unit late, submitting "will appear" arrest forms late and failing a general criminal law examination. *See* Miami Police Dep't Reprimand of Melissa Stuckey, Miami Police Dep't Reprimand of Ariel Saud; Miami Police Dep't Reprimand of Donald Lago; Letter to Sergeant John O'Brien, Training Bureau re: Salvador Lozano; all attached as Exhibit A to Mr. Lans' Response to Defendants' Motion to Strike Complaint. However, none of these incidents even remotely relates to false arrests or how any of the officer defendants performed reverse sting prostitution operations prior to Mr. Lans' arrest. Mr. Lans presents no evidence that any of these officers were, prior to his arrest, accused of performing false arrests, let alone false arrests during reverse sting prostitution operations. Thus, there is insufficient evidence that the City was on notice that these officers would effect a false arrest in this context. Thus, Mr. Lans' § 1983 claim against the City, insofar as it is based on the City's indifference to changing its practices in the face of widespread prior abuses, fails.

2. OBVIOUS NEED TO TRAIN

A municipality's failure to properly train its officers in a particular practice may so obviously result in constitutional rights violations that its failure to train exhibits deliberate indifference to constitutional rights. *Gold*, 151 F.3d at 1351-52; *Owens*, 174 F.Supp.2d at 1297-98. In such circumstances, there need not be a pattern of prior similar abuses to put the municipality on notice of the need to train its officers in how to constitutionally exercise the practice. Owens, 174 F.Supp.2d at 1297-98.

Owens held that the use of neck restraints ("chokeholds") was not a practice where the need for training was so obvious that a municipality's failure to train exhibited deliberate indifference to constitutional rights violations. *Id.* at 1298. It is even less obvious that constitutional rights violations will result from the City's failure to train its officers in conducting reverse sting prostitution operations. For example, the use of chokeholds is a practice that

poses a greater risk of excessive force, a risk not necessarily present when officers conduct a reverse sting prostitution operation. Thus. Mr. Lans' § 1983 claim against the City, insofar as it is based on the City's indifference to changing its practices due to the obvious risk of constitutional rights violations in reverse sting prostitution operations, fails.

C. FAR-REACHING POLICY OF ABUSE

Finally, Mr. Lans alleges that the City is liable under § 1983 because it has adopted a widespread policy where it permits officers to hide improper arrests, plant weapons, perform illegal stops and fails to warn the public of rights-violating officers. Complaint at ¶ 33, f, h, j,1.

This claim fails because Mr. Lans does not present any evidence establishing that such a widespread policy exists. Mr. Lans attaches his own affidavit and that of Nathaniel Wilcox, both of which contain legal conclusions regarding the unconstitutionality of the City's police policies as a whole. See Affidavit of Adrean Lans at In 30-32 [D.E. 67] ; Affidavit of Nathaniel Wilcox at ¶¶ 7-8 [D.E. 74]. These affidavits are insufficient because they contain conclusory assertions without any specific facts establishing the existence of such policies. *See Leigh v. Warner Bros.*, 212 F.3d 1210, 1217 (11th Cir. 2000) ("[C]onclusory allegations without specific supporting facts have no probative value.") (citation omitted). Thus, these affidavits will not create an issue of fact sufficient to defeat a motion for summary judgment. *Owens*, 174 F.Supp.2d at 1294 ("An affidavit containing conclusory assertions will not create an issue of fact suffieient to defeat summary judgment.") (citation omitted). Mr. Lans also attaches several newspaper articles regarding City of Miami police officers. The articles discuss lawsuits against the City over a 1996 SWAT shooting and a 1997 gun-planting conspiracy, the City's crime rate, and complaints of beating, harassment, and theft by City police officers. *See Attorney's Civil Lawsuit Spurred Action,* MIAMI HERALD, Sept. 8. 2001; *Police Abuse Was...,* MIAMI HERALD, Mar. 22, 2002; *Miami Crime Rate Drops 9%,* MIAMI HERALD, Jan. 13, 2005; all attached as exhibits to Lans' Response to Defendants' Motion to Strike First Amended Complaint. Yet, these article do not at all relate to false arrests during revere sting prostitution operations. Thus, they do not show that the City

has a policy or custom of violating constitutional rights in the course of reverse sting prostitution operations.

Furthermore, assuming Mr. Lans could establish that such a widespread policy existed, his claim fails because he does not show how such a policy caused his particular constitutional rights violation. Insofar as he alleges a widespread policy of deception, weapons-planting, and inadequate warnings, Mr. Lans must present evidence showing that such a policy caused him to be falsely arrested in this reverse sting prostitution operation. *See McDowell v. Brown*, 392 F.3d 1283, 1292 (11th Cir. 2004) ("A plaintiff must prove causation by demonstrating that the municipality's deliberate conduct ...was the `moving force' behind [his] injury.") (citation omitted) (emphasis in original). As none of these alleged policies relate to reverse sting prostitution operations, there is no evidence showing a causal link.

IV. CONCLUSION

In sum, the City's motion for summary judgment on Count V of Mr. Lans' complaint is GRANTED.

DONE and ORDERED in chambers in Miami, Florida this 17th day of October, 2005.

ENTERED: OCT-18-2005

/s/
Adalberto Jordan
United States District Judge

Copy to: Magistrate Judge Klein
All counsel of record
Adrean Lans, *pro se*,
P.O. Box 01-5092, Miami, FL 33101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN

ADREAN LANS,)
Plaintiffs)
)
vs.)
)
MELISSA STUCKEY,)
et. al.)
Defendants)
)

ORDER RESCHEDULING TRIAL DATE

In light of the court closing due to Hurricane Wilma, this case is reset for trial to start on Friday, November 4, 2005 at 11:00am.

DONE and ORDERED in chambers in Miami, Florida, this 1st day of November, 2005.

ENTERED: NOV-2-2005

/s/
Adalberto Jordan
United States District Judge

Copy to: Magistrate Judge Klein
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ADMINISTRATIVE ORDER 2005-48

IN RE:

THE MATTER OF THE SUMMONING OF JURY PANELS FOR TRIALS IN MIAMI, FLORIDA
_____/

Hurricane Wilma made landfall in Southern Florida or. Monday, October 24, 2005. All divisions of the Southern District of Florida were affected by this storm and remained largely closed through October 31, 2005 due to power outages and impassable roadways. While the Court reopened on a limited basis on November 1, 2005, lingering extensive power outages across the District led to the suspension of the summoning of jury panels in all divisions through Friday, November 4, 2005. Realizing that this will impact upon the criminal trial calendar, the Court considering same has voted unanimously that the period from October 24, 2005 through November 4, 2005 shall be excluded from the computation of time within which a trial must commence for purposes of the Speedy Trial Act. See 18 U.S.C. § 3161 et seq. Accordingly, it is thereupon

ORDERED AND ADJUDGED, as follows:

1. The summoning of jury panels for trials to be conducted in all Divisions of the Southern District of Florida shall be suspended until Monday, November 7, 2005.

2. The period of delay - that is, October 24, 2005 through November 4, 2005 - shall be excluded from the computation of time within which trial commenced, based upon the following findings:

(a) The Court takes judicial notice of extensive power interruptions across all the Court's Divisions affecting transportation and communication and compromising public safety, as well as substantial damage to personal property;

(b) The ends of justice served by suspending jury trials during this period, and the continuances occasioned thereby, outweigh the interests of the respective defendants and the public in a speedy trial;

(c) Because of the attendant circumstances presently existent across the Southern District of Florida, it is the finding of this Court that failure to take this action would necessarily result in a miscarriage of justice.

It is further,

ORDERED AND ADJUDGED that the Clerk of Court is directed to file a copy of this order in each criminal case on the Court's docket for trial in all Divisions of the District and to provide it as notice to the United States Attorney and to all counsel of record in each criminal case affected hereby.

DONE AND ORDERED in chambers at Fort Lauderdale, Broward County, Florida, this 4th day of November 2005.

ENTERED: NOV-4-2005

/s/
WILLIAM J. ZLOCH
CHIEF UNITED STATES
DISTRICT JUDGE

Copy to: All Southern District Judges
All Southern District Magistrate Judges
Court Administrator • Clerk of Court
Alexander Acosta, Interim United States Attorney
Kathleen Williams, Federal Public Defender

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN

ADREAN LANS,
Plaintiffs

vs.

MELISSA STUCKEY,
et. al.
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with the findings of fact and conclusions of law announced orally at the conclusion of today's bench trial, see FED. R. CIV. P. 52, I find that Officers Stuckey and Lago had probable cause to arrest Mr. Lans for soliciting prostitution. Accordingly, I find for Officers Suckey and Lago and the City of Miami on the remaining claims (count I: false arrest claim under 42 U.S.C. § 1983 against the officer defendants; count II: false arrest claim under Florida law, based on respondeat superior liability, against the City; count III: false arrest/false imprisonment claim under Florida law against the officer defendants; count IV: malicious prosecution claim under Florida law against the officer defendants).

Final judgment will be entered separately.

DONE and ORDERED in chambers in Miami, Florida, this 4th day of November, 2005.

ENTERED: NOV-7-2005

/s/
Adalberto Jordan
United States District Judge

Copy to: All counsel of record
Magistrate Judge Klein

Adrean Lans, *pro se*,
P.O. Box 01-5092, Miami, FL 33101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN

ADREAN LANS,)
Plaintiffs)
)
vs.)
)
MELISSA STUCKEY,)
et. al.)
Defendants)
)

FINAL JUDGMENT

Pursuant to rules 54 and 58 of the Federal Rules of Civil Procedure, final judgment is hereby entered against Adrean Lans and in favor of the defendants – Officers Melissa Stuckey, Donald Lago, Ariel Saud, Salvador Lozano, Commander Jorge Hugo Gomez, and the City of Miami – on all claims. Mr. Lans shall take nothing from this cause.

This case is CLOSED.

DONE and ORDERED in chambers in Miami, Florida, this 4th day of November, 2005.

ENTERED: NOV-7-2005

/s/
Adalberto Jordan
United States District Judge

Copy to: All counsel of record
Magistrate Judge Klein
Adrean Lans, *pro se*,
P.O. Box 01-5092, Miami, FL 33101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-22173-CIV-JORDAN

ADREAN LANS,
Plaintiffs

vs.

MELISSA STUCKEY,
et. al.
Defendants

ORDER ON POST-TRIAL MOTIONS

Mr. Lans' motions for reconsideration of the ruling on the defendants' motion for summary judgment [D. E. 105], for recusal [D. E. 103], and for a new trial [D.E. 101] are all DENIED. This case is CLOSED.

Mr. Lans moves for reconsideration of my order granting in part the officer defendants' motion for summary judgment and my order granting the city's motion for summary judgment. As Mr. Lans relies on Rule 59(e), this is really a motion to alter or amend a final judgment. Mr. Lans is essentially re-arguing the points he made or could have made in his responses to the motions for summary judgment and this is not grounds to alter or amend a judgment. See *O'Neal v. Kennamer*, 958 F. 2d 1044, 1047 (11th Cir. 1992) ("Motions to amend should not be used to raise arguments which could, and should, have been made before the judgment was issued.").

Mr. Lans raises a number of issues in his motion for a new trial. First, he says I never ruled on his motion for summary judgment. To the contrary, I ruled on - and denied - Mr. Lans' motion for partial summary judgment orally at the September 15, 2005 summary judgment hearing.

Second, he says I denied him due process by denying his motion for continuance. I disagree. Mr. Lans did not move for a continuance of trial until the day of trial. Moreover, Mr. Lans withdrew his motion for a continuance during trial. Third, he says my law clerk misled Mr. Lans as to the importance of depositions. My law clerk did not mislead Mr. Lans, who had about 8 months to get the depositions transcribed. Fourth, he says I did not rule on whether the officers acted within the City's jurisdiction. To the contrary, 1 found at trial that the officers were acting within the City of Miami's jurisdictional boundaries. His fifth point, that I should have recused, is discussed below.

Mr. Lans argues that I should recuse from this case under 28 U.S.C. § 455(a). He first says, in a conclusory manner, that I should recuse because I am partial to the City and the officer defendants. As Mr. Lans explained his theory at the conclusion of trial, I am biased because I am Hispanic, as are some of the officer defendants and defense counsel. This claim is frivolous. No reasonable person would assume bias or prejudice just because a judge is of the same race, ethnicity, or gender as one of the litigants. Furthermore, 1 note that Mr. Lans did not raise this recusal issue until after I found at trial that neither the City nor the officers are liable to Mr. Lans. Indeed, just before opening arguments at trial, Mr. Lans expressed in open court that he was confident in my ability to render a proper judgment, that he thought my rulings so far were logical and just, and that he felt 1 had given him access to the courts. And before trial, Mr. Lans waived his right to a jury. Mr. Lans also says that I should recuse because I ruled against him in a previous unrelated case and have made certain unspecified "comments" in this case. However, prior judicial rulings almost never constitute a basis for a recusal motion. *See Litecky v. United States*, 510 U.S. 540, 555 (1994). To serve as a basis for recusal, my opinions in the prior or current proceedings must "display a deep seated favoritism or antagonism that would make fair judgment impossible." *Id*. Mr. Lans has not shown that I have a deep-seated antagonism towards him. Thus, my statements, rulings and opinions in the prior or current case are not a basis for recusal.

Finally, Mr. Lans' reliance on the Florida recusal statute is misplaced because it employs a much lower standard of proof on the party seeking recusal than the federal recusal statute. Under the Florida recusal statute, Fla. Stat. § 38.10, a judge must grant a party's

first motion to recuse as long as the facts attested provide reasonably sufficient support for finding the party has a well- fear he will not receive a fair trial. *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983). The judge cannot pass on the truth of the allegations; he must recuse as long as the grounds for recusal are not frivolous or fanciful. *State ex rel. Brown v. Dewell*, 179 So. 695, 698 (Fla. 1938). Moreover, the Florida statute treats recusal as "a question of what feeling resides in the party's mind and the basis for such feeling." *Livingston*, 441 So. 2d at 1087 (quotations omitted). Under 28 U.S.C. § 455(a), the federal statute, the party seeking recusal must show that an "objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Carter v. West Pub. Co.*, 1999 WL 994997, *2 (11th Cir. 1999).

Thus, the test for recusal under the federal statute is more stringent than the test under the Florida statute in at least two significant ways. First, while a Florida state court judge must recuse as long as the party's stated grounds and beliefs are not frivolous, a federal judge should recuse only if the underlying facts show a significant doubt that he cannot be impartial. Second, while recusal under the Florida statute is determined from the perspective of the interested party seeking recusal, a federal judge can only recuse if a disinterested, objective observer would find that the judge cannot be impartial.

DONE and ORDERED in chambers in Miami, Florida, this 22nd day of November, 2005.

ENTERED: NOV-23-2005

/s/_____
Adalberto Jordan
United States District Judge

Copy to: All counsel of record
Magistrate Judge Klein

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 05-16538-CC, 05-16539-CC & 05-16835-CC
Non-Argument Calendar

D. C. Docket No. 04-22173-CV-AJ

ADREAN LANS,

Plaintiff-Appellant,

versus

MELISSA STUCKEY,
DONALD LAGO,
ARIEL SAUD,
SALVADOR LOZANO,
JORGE HUGO GOMEZ,
CITY OF MIAMI,
a Florida Municipal corporation,

Defendants- Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

(October 19, 2006)

Before MARCUS, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Adrean Lans, proceeding pro se, appeals several adverse rulings related to the judgment against his complaint of misconduct by the City of Miami and five of its police officers during the course of Lans's arrest on charges of soliciting prostitution. We affirm.

I. BACKGROUND

On the evening of September 5, 2001, Miami police officers Melissa Stuckey, Donald Lago, Ariel Saud, Salvador Lozano, and Jorge Gomez were involved in a "reverse-sting" operation regarding solicitation of prostitution. Stuckey was standing at a bus stop, posing as a prostitute. Lans drove by in his car. After several events, discussed below, Lago brought Lans in a police car to the Allapattah police station, while Saud drove Lans's vehicle to the station. At the station, Gomez completed the paperwork regarding Lans's arrest, and Lozano prepared the paperwork for the impoundment of Lans's vehicle.

According to the facts found by the district court following a bench trial, Lans had driven by Stuckey and offered her money in exchange for oral sex. Stuckey gave a signal for Lans to be taken down, after which Lago ordered Lans to get out of his vehicle. Lago performed a pat-down search, took Lans immediately into custody, and brought Lans to the police station.

Lans's version of the arrest differs. Lans contends that he recognized Stuckey when he drove by her and, for that reason, offered her a ride, which she declined. Lans contends that Lago never received a "take-down" signal. Lago stopped Lans, and took Lans's wallet and two cell phones, but then let Lans drive away after being told by Stuckey to do so. Lans alleges that he returned to retrieve a cell phone from Lago, was stopped again, and was taken into custody by Lago, who brought Lans to the police station.

Lans filed a complaint with claims for relief under both federal and state law. Lans alleged in his complaint that Stuckey, Lago, Saud, Lozano, Gomez, and the City of Miami are liable to him for damages based on violations of his federal civil rights. *See* 42 U.S.C. § 1983. Lans's complaint also asserted claims against Stuckey, Lago, Saud, Lozano, and Gomez for malicious prosecution and claims against all the defendants for false imprisonment and false arrest.

During discovery, Lans served subpoenas duces tecum on Stuckey and Gomez together with notices of depositions. Lans later filed two motions to compel Stuckey and Gomez to produce additional documents in compliance with the subpoenas. The magistrate judge to whom discovery motions had been referred denied Lans's motions.

Lago, Saud, Lozano, and Gomez moved for summary judgment on all the claims against them, and the City of Miami moved for summary judgment on the section 1983 claim against it. The district court denied Lago's motion and granted the motions filed by Saud, Lozano, Gomez, and the City of Miami. The district court held a bench trial on all the claims against Stuckey and Lago and on the false arrest claim against the City of Miami. Gomez, Stuckey, Lago, and Lans testified. Crediting the testimony of the police officers, the district court concluded that the officers had probable cause to arrest Lans and granted judgment to Stuckey, Lago, and the City of Miami on all of the remaining claims against them. Lans filed three separate notices of appeal, which have been consolidated for this decision.

II. DISCUSSION

Lans appeals (1) the denial of two of his motions to compel; (2) the conclusion of the district court that Stuckey and Lago had probable cause to arrest Lans for soliciting prostitution, and the finding of fact that supports the conclusion; (3) the grant of summary judgment to Saud, Lozano, and Gomez; (4) the grant of summary judgment to the City of Miami; (5) the denial of a motion for a continuance that he filed during trial; and (6) the denial of a motion to recuse that he filed after the trial ended. We discuss each issue in turn.

A. The Magistrate Judge Did Not Abuse His Discretion in Denying Lans's Motions To Compel

"When reviewing a . . . denial of a motion to compel discovery, we apply an abuse of discretion standard." *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006). The district court is permitted a "range of choice," and we will not "second-guess" its actions unless they "reflect a clear error of judgment." *Id.*

(internal quotation marks omitted). The magistrate judge did not abuse his discretion. The magistrate judge concluded that Stuckey and Gomez had complied with Lans's subpoenas duces tecum to the full extent possible. The magistrate judge credited certain representations made under oath by Stuckey and Gomez at their depositions, as well as representations made in open court by counsel for the defendants. The magistrate judge did not commit a clear error of judgment in crediting those representations.

B. The District Court Did Not Err in Concluding That There Was Probable Cause for Lans's Arrest

At the bench trial, the district court credited the testimony of the officers and found that Lans had offered Stuckey money in exchange for oral sex. On the basis of that finding, the district court concluded that there was probable cause for Lans's arrest. Lans contends that the district clearly erred in its finding of fact and in its conclusion that probable cause existed. We disagree.

We review de novo the determination that probable cause existed, but review the supporting findings of fact for clear error. *United States v. Jiminez*, 224 F.3d 1243, 1248 (11th Cir. 2000). Determinations of witness credibility fall within the exclusive province of the fact-finder and may not be revisited unless the testimony is "'incredible as a matter of law.'" *United States v. Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997) (*quoting United States v. Hewitt*, 663 F.2d 1381, 1386 (11th Cir. 1981)). Witness testimony is incredible as a matter of law only when it is "unbelievable on its face" and when it testifies to "facts that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *Id.* (internal quotation marks omitted).

Lans's arguments that the district court erroneously found probable cause fail. Because Stuckey's testimony that Lans offered her money in exchange for oral sex is not incredible as a matter of law, the district court correctly determined that there was probable cause for Lans's arrest for soliciting prostitution. *See* Fla. Stat. § 796.07. That the district court did not find that Lans actually paid Stuckey or that Lans had any money on his person is immaterial, because the crime of soliciting prostitution does not require the actual exchange of money. That the officers also may have arrested

Lans under the wrong subsection of the Florida prostitution statute is of no moment. "'[W]hen an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest.'" *Lee v. Ferraro*, 284 F.3d 1188, 1196 (11th Cir. 2002) (*quoting United States v. Saunders*, 476 F.2d 5, 7 (5th Cir.1973)).

C. Even if Erroneous, the Grant of Summary Judgment to Saud, Lozano, and Gomez Was Harmless Error

We review a grant of summary judgment de novo. *Bosarge v. U.S. Dep't of Educ.*, 5 F.3d 1414, 1417 (11th Cir. 1993). The district court granted Saud, Lozano, and Gomez summary judgment against Lans's claim under section 1983 based on qualified immunity. Qualified immunity protects police officers performing discretionary functions from liability under section 1983 as long as their conduct does not violate a clearly established constitutional right. *See Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988). After an officer establishes that his acts were within the scope of his discretionary authority, the burden then shifts to the plaintiff, *id.* at 1563-64, who faces a two-step inquiry: the plaintiff must (1) establish that the officer violated a constitutional right and (2) establish that the violated right was clearly established, *Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004).

At the summary judgment stage, Lans contended that the evidence demonstrated that Saud, Lozano, and Gomez participated in a bad faith and illegal arrest that violated his clearly established constitutional rights. The district court disagreed. As to Lans's state law claims against Saud, Lozano, and Gomez, the district court also granted summary judgment, because it determined that the Florida sovereign immunity statute, Fla. Stat. § 768.28(9)(a), shielded the officers.

Even if the district court erred in entering summary judgment, any error was harmless. Because we affirm the conclusion of the district court following the bench trial that there was probable cause for Lans's arrest, Lans could not in any event have sustained any of his claims against Saud, Lozano, or Gomez. The summary judgment, even if erroneous, "did not affect the substantial rights of

the parties." Fed. R. Civ. P. 61; *cf. Wilson v. Muckala*, 303 F.3d 1207, 1219 (10th Cir. 2002) (holding that grant of summary judgment, even if erroneous, was harmless in light of later determinations by jury).

D. Even if Erroneous, the Grant of Summary Judgment to the City of Miami Was Harmless Error

A municipality may be liable under section 1983 for the actions of a police officer "only when municipal 'official policy' causes a constitutional violation." *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998) (*quoting Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978)). A plaintiff must "'identify a municipal "policy" or "custom" that caused [his] injury.'" *Id.* (*quoting Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 1388 (1997)). The district court granted summary judgment to the City of Miami on the ground that Lans failed to identify a policy or custom.

Even if the district court erred, the error was harmless. Because we affirm the conclusion of the district court following the bench trial that there was probable cause for Lans's arrest, Lans could not in any event have established that he was arrested illegally and suffered a constitutional violation. Lans could not have sustained his section 1983 claim against the City of Miami.

E. The District Court Did Not Abuse Its Discretion in Denying Lans's Motion for a Continuance

During the bench trial, in the middle of his direct examination of Stuckey, Lans filed a motion for a continuance. Lans argued two bases for his motion: (1) the need to obtain deposition transcripts for the purpose of impeaching witnesses; and (2) the need to procure the attendance of his physician, who would testify as to medical damages. The district court denied the continuance, but informed Lans that, in the event that he prevailed on liability, he would have the opportunity to bring in his physician on the issue of damages. Lans contends that the district court erred in denying his motion. We disagree.

As a preliminary matter, the district court effectively granted Lans a continuance with respect to the testimony of Lans's

physician, and as to the continuance with respect to the deposition transcripts, we review the denial of a motion for a trial continuance for abuse of discretion. *United States v. Bowe*, 221 F.3d 1183, 1189 (11th Cir. 2000). We consider four factors: (1) the extent of the movant's diligence in his efforts to be ready on the date of the trial; (2) how likely it is that the need on which the request for the continuance was based could have been met had the continuance been granted; (3) the extent to which the continuance would have inconvenienced the court and the opposing parties; and (4) the extent to which the movant might have suffered harm as a result of the denial. *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1350-51 (11th Cir. 2003) (quoting *Hashwani v. Barbar*, 822 F.2d 1038, 1040 (11th Cir. 1987)). We are "mindful that '[t]he denial of a continuance is within the broad discretion of the district court and will not be overturned unless arbitrary or unreasonable.'" *Id.* (quoting *Hashwani*, 822 F.2d at 1040).

The district court did not abuse its discretion. Lans had taken depositions more than seven months before the trial, and at the summary judgment hearing, approximately six weeks before the trial, the district court had reminded Lans to order deposition transcripts. As of the day of the trial, Lans had not ordered the transcripts. Lans's extreme lack of diligence, coupled with the fact that the trial had already begun, gave the district court ample reason to deny Lans a continuance.

F. The District Court Did Not Abuse Its Discretion in Denying Lans's Motion To Recuse

On November 9, 2005, several days after the bench trial had concluded and judgment had been entered against Lans, Lans filed a motion to recuse the district court. *See* 28 U.S.C. § 455(a). In a thorough order, the district court denied Lans's motion. Lans contends that the district court erred. We disagree.

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* We review the decision of the district court not to recuse under section 455(a) for abuse of discretion. *United States v. Bailey*, 175 F.3d 966, 968 (11th Cir. 1999). The district court did not abuse its discretion. Except for Lans's disagreement with certain rulings that the district court made during the bench trial, all of the

grounds upon which Lans relies for his motion to recuse were known to him before the district court ruled against him on the merits. We have previously held that a party, "knowing the facts claimed to support a § 455(a) recusal for appearance of partiality[,] may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) (*citing United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983)). As for the rulings during the bench trial, those rulings cannot serve as the basis for a recusal motion unless the movant also demonstrates "pervasive bias and prejudice" by the district court. *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (internal quotation marks omitted). The district court exhibited no bias or prejudice against Lans. On the contrary, the transcript reflects that the district court exhibited patience in the face of ad hominem attacks by Lans, and the district court attempted repeatedly to assist Lans with perfecting this appeal.

III. CONCLUSION

The judgment against Lans is
AFFIRMED.

ENTERED: OCT-19-2006 /s/
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-16538-CC
No. 05-16539-CC
No. 05-16835-CC

ADREAN LANS,

Plaintiff-Appellant,

versus

MELISSA STUCKEY,
DONALD LAGO,
ARIEL SAUD, et. al.,

Defendants- Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC

Before: MARCUS, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

ENTERED: DEC-7-2006 /s/_____
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 05-16538-CC, 05-16539-CC & 05-16835-CC

ADREAN LANS,

Plaintiff-Appellant,

versus

MELISSA STUCKEY,
DONALD LAGO,
ET. AL.

Defendants- Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

ORDER:

Appellant's motion to recall the mandate is DENIED.

The Clerk is directed to accept no further filings in this closed appeal.

ENTERED: JAN-19-2007 /s/_____
UNITED STATES CIRCUIT JUDGE